The Value of the Language of Rights in Christian Ethics, With Particular Reference to Reproductive Rights

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Abstract

The language of rights has become highly respectable in Church circles and in the works of Christian ethicists, especially since the end of the Second World War. The literature on this subject is immense, yet much of this writing avoids the basic analytical issues presented by this form of moral language. This thesis begins with the conviction that theologians can learn a good deal about the value of the language of rights from recent literature on the subject in moral philosophy and in jurisprudence or legal philosophy.

Once one begins to study the analytical issues connected with the language of rights, one is confronted with the possibility of a radical scepticism regarding its value. Thus, the opening chapters of this work attempt to show forth this scepticism and to overcome it. In doing so one is challenged to clarify the concept of rights with the help of various useful distinctions, e.g. between 'human rights' and 'special moral rights', 'mandatory' and 'discretionary' rights; and a 'cluster' of legal concepts borrowed from Wesley Hohfeld and applied in the moral sphere: 'Claims', 'liberties','powers' and 'immunities'. These clarificatory distinctions (and many others introduced in the text) help to overcome scepticism and provide a flexible form of moral language, useful both to philosophers and theologians.

If philosophy is the 'handmaid of theology' in helping analyse and clarify the language of Christian ethics, it must be recognised that the Christian tradition has much to offer in understanding the proper significance of the human need to claim what is due. Although this thesis is primarily methodological and metaethical, I insist on uncovering basic normative ethical positions underlying the language of rights. In particular, I stress the Christian understanding of human dignity as the foundation of the language of rights.

In the second part of my thesis I try to show how the clarification of the language of rights helps in discussing the issues involved in the area of reproductive rights. This includes some analysis of the values associated with human procreation and the normative relationships expressed by the language of rights and duties. The complexity of rights-language is shown in the context of a discussion of controversial subjects, from population control to treatment for infertility.

Preface

My gratitude is due to many persons who helped in the process of writing and producing this thesis. In first place my sincere thanks must go to my supervisors, Dr. Robin Gill of New College and Dr. R.A.A. McCall Smith of Old College. Without their friendly support and helpful criticisms at various stages in the generation of this work, these pages would not have seen the light of day.

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Declaration

I declare that the following pages of this thesis have been composed and consigned to paper by myself alone. I have attempted at all times to give credit to all my sources within the text and in the references at the end of the work.

Note Concerning References in the Text

It will be noted in the text that references to pagination do not always refer to the page numbering of the original article or book. When this divergence occurs I mention in the references that I am taking the pagination from the reprinted article or work.

Abbreviations

AAS	Acta Apostolica Sedis.
AC	Appeals Cases
All E.R.	All England Law Reports 1936-
ARSP	Archives fur Rechts-und Socialphilosophie
BMJ	British Medical Journal
CIO	Church Information Office
CIIR	Catholic Institute for International Relations
CTS	Catholic Truth Society
CUP	Cambridge University Press
DLT	Darton, Longman and Todd
DS	Denzinger-Sconmetzer (Enchiridion Symbolorum
ed(s).	editor(s)
HCR	Hastings Center Report
HMSO	Her Majesty's Stationary Office
JME	Journal of Medical Ethics
JRE	Journal of Religious Ethics
n.d.	no date
OUP	Oxford University Press
PAS	Proceedings of the Aristotelian Society
PASS	Proceedings of the Arist. Soc., Supplementary Volume
RKP	Routledge and Kegan Paul
RN	Rerum novarum
RSV	Revised Standard Version
SC	Sessions Cases, Scotland,1906-
SCM	Student Christian Movement
trans.	translator

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Introduction

This is an age in which human society has become accustomed to the use of the language of rights. Such language appears to be both morally and intellectually respectable. Yet this appearance conceals many problems which have been the subject of concern for moral philosophers and legal philosophers, especially in recent decades. Some of the problems associated with rights-language concern the analysis of the concept of rights within moral and legal language, and much of this thesis will be taken up with an examination of this discussion.

Put in a more technical way, the emphasis in this thesis will be on 'metaethical' issues rather than on issues arising in normative ethics, and on methodological issues rather than on substantive moral issues. Not that these approaches to ethics can be separated radically; in fact, it seems that they are closely related. A. Gewirth (1960) points out some of the connections between metaethics and normative ethics. For instance, in the work of R.M.Hare, according to Gewirth, there is a move from metaethics to normative ethics in the discussion of methods of justifying moral decisions (cf.Hare,1952). Gewirth says of Hare, 'that his metaethical or logical analysis is at the same time normatively ethical, in that it distinguishes between what he himself regards as morally good and bad.' (Gewirth,1960:194). A clear example here is the way in which the 'principle of universalizability', which is so stressed by Hare, straddles the alleged divide between metaethics and normative ethics. The principle of universalizability enables one to distinguish between properly moral and non-moral uses of terms like 'good' and 'ought'; it establishes a basic criterion for the recognition of moral language, and as such is metaethically useful. But this principle, which Hare borrows from Kant, is also a possible basis for a normative ethical system, since it

involves as well a principle of justice, fairness, or equity, i.e. 'treat like persons and situations alike'.

Another example of the relationship between metaethics and normative ethics concerns the way metaethical theories colour one's choice of normative ethical systems. For instance, if one holds an emotivist theory of the meaning of moral language, like A.J.Ayer (1946) and C.L.Stevenson (1944), this may influence the way one makes moral decisions and the way one discusses moral issues with others. In fact, rational discussion seems to be practically impossible in emotivism because of the highly subjective nature of 'moral' positions.

Regarding the language of rights, then, there is a two-way influence between metaethical and normative approaches to its use. One comes to the metaethical stage with normative positions already in mind, for who can be totally neutral regarding rights-issues? However, metaethics, in turn, enables one to recognise some of the problems related to the use of the language of rights in normative contexts.

What relevance has all this for Christian ethics? The most obvious response is that Christians use the language of rights like nearly everyone else and they are equally prone to abuse moral language by being vague in their understanding of the complex relationships between moral terms. Even Christian theology can be accused of ignoring to a great extent the analysis of the language of rights at the metaethical level. I can find only a handful of Christian ethicists writing in the English language or translated into English who treat of the metaethical issues surrounding the concept and language of rights. It is odd that Christianity has moved from a situation of hostility to this form of language to one of almost naive and unquestioning acceptance. John Henley (1986) speaks of 'the naivety with which some theologians and church

leaders concerned about human rights have understood the relation between theoria and praxis.'(Henley,1986:367) And he goes on, 'This has meant that the cause of human rights has been virtually taken for granted in certain circles, especially those of the World Council of Churches, and little critical attention has been paid to such matters as its foundations.' (ibid.).

In the first part of my work, then, I attempt to introduce some of the complexities involved in using the language of rights, borrowing wholesale from the voluminous literature in philosophy and jurisprudence. I face up to two kinds of scepticism concerning the use of rights-language: one kind being properly metaethical, and the second, normative. (If there is any recognition of scepticism about rights at a popular level, it is to be found at the normative level, especially in relation to the amazing proliferation of rights-claims in recent years. Thus, Lisa Sowle Cahill (1980) mentions as well as the Quinlan case, where a 'right to die' was in question, the case of 'an eighty-year-old Japanese sandalmaker [who] had won the "right to sunshine" (asserted against the construction of skyscrapers) from the Tokyo District Court, and the Fiji Island gold miners [who] were seeking "the right to a sex break" during their lunch period.'(Cahill,1980:277).)

Having considered the contribution which philosophy and jurisprudence might pay to Christian ethics, I next turn to the contribution which the Christian theological tradition can pay to the secular ethical approach to rights. This includes an examination of the application of rights-language to the relationship between believers and God and the central notions of human dignity and human creation in God's image.

The second part of my thesis begins with a summary of the main issues involved in applying the language of

rights to particular areas of human flourishing, with special reference to the goods associated with human procreation. In the final chapters I attempt to analyse some problematic areas within the sphere of reproductive freedom where conflicts arise at various levels, for instance: at the level of competing goods and interests; the identification of possible right-holders in relation to the central values inherent in procreation; the normative relationship between right-holders and potential duty-bearers; and the contribution of Christian ethics to the general debate concerning these topics. I hope to show that the initial radical scepticism about rights and right-language can give way to the position which accepts their moral respectability.

What is novel about this thesis is the change of emphasis from the traditional concentration (especially in Roman Catholic moral theology, but also in secular ethics) upon duties and obligations to the language of rights. Kevin Kelly (1967) underlines the preoccupation with duty and obligation in the traditional manual approach to moral theology or Christian ethics by quoting from the traditional Roman Catholic manuals. Let me give one example: 'Moral theology is that part of theology which treats of the ordering of human acts to their final supernatural end by the observance of the commandments' (Aertyns-Damen,1939:vol.1,xvii; Kelly,1967:121). A concentration on rights, however, begins from a different angle, from the point of view of the person who is in a position to claim something from others. One might say that such an approach is in fact more fundamental than the emphasis on obeying commandments and rules, since these latter moral realities are usually imposed for the sake of rights.

It is my contention in the following pages that the language of rights in Christian ethics provides a different approach to moral living and ethical study than

is to be found in the more traditional preoccupation with obligations and right action. In particular I shall show how the language of rights is important from the point of view of its ability to introduce a degree of flexibility into normative relationships in which people find themselves naturally (natural rights), or into which they enter by free decision (special moral rights). And yet, when important goods are at stake, the language of rights can be as strict and as demanding as any moral system which stresses absolute obligations and principles.

Part 1:

Analytical Issues and the Refutation of Scepticism

> Individuals have rights, and there are things no person or group may do to them (without violating their rights).
>
> Robert Nozick, Anarchy, State and Utopia,(1974), p.ix.

> At present, it is difficult to live with and without "rights-talk".
>
> David Little, 'Human Rights: An Exuberant Disarray', Hastings Center Report,1988,18/2,p.40.

> As much as I value a respect for human beings, all human beings great and small, good and bad, stupid and reflective, as much as I would like to see the United Nations Declaration on Human Rights become a reality, i.e., be implemented and respected by all nations, it seems to me quite evident that we do not know that there are any universal human rights.
>
> Kai Nielson, 'Scepticism and Human Rights', The Monist, 1968, p.594.

Chapter 1

Initial Elucidation of Rights-Language

1.1 Introduction

This chapter attempts to clarify the language of rights, first of all at a general level, not quite the level of everyday usage, but still at a relatively unspecialised and untechnical level of discourse. Thus, I begin by concentrating on terms that are widely regarded as being practically synonymous with rights, e.g., 'claim', 'entitlement', 'power', and 'liberty'.

From this general level I proceed to elucidate the concept of rights at a specialised level - the level at which legal and moral philosophers discuss the terms mentioned above. At this stage it should have become clear that clarity in elucidating rights-language does not automatically do away with controversy. Indeed, it will be seen how debate on the subject of rights involves differences of opinion at the metaethical level as well as at the normative level. In other words, there is disagreement not merely on the question of what rights people have (a normative question), but also concerning questions of the analysis of the concept of 'right' (a metaethical question).

Having pointed out some of the areas of controversy at both general and specialised levels, I turn my attention to the discussion of two basic theories of rights. This will lead to the central question of the essential value of rights-language. These theories must be kept in mind throughout the course of my work.

I see the attempt to clarify the language of rights in this manner as useful in a number of ways. First, clarity is a response to that scepticism which accuses rights-

language of being incurably vague. Second, this analysis is a step towards the provision of a useful set of tools for working on the question of human dignity, as well as helping in the area of moral and legal casuistry. Finally, the clarification of rights-language at this basic moral and legal level is a necessary foundation for the construction of a theological analysis of the concepts expressed in the language of rights.

1.2 General Analysis of Rights-Language

A. Rights as 'Claims'

It is quite common in moral and legal philosophy to associate rights with 'claims' (cf. Feinberg,1970:149 1974:159; Gewirth,1984:1; Wasserstrom,1964:10; Mayo, 1965: 221). The work of Joel Feinberg is especially associated with the development of the idea of rights as claims, so I will follow some of his argument in what follows.

In his article, 'The Nature and Value of Rights', Feinberg distinguishes different uses of the terminology of claiming. For instance, a person may 'make claim to something'. Or a person may 'claim that' something or other is the case. Or then again a person may, according to Feinberg, 'have a claim' (Feinberg,1970:149).

The first instance - 'making claim to' - Feinberg argues, is typified in those cases where a right-holder demands his due; often when something is acknowledged to be his, e.g. 'something borrowed, say, or improperly taken from him' (ibid.,150). Frequently, a person makes a claim in such circumstances by presenting a chit, or ticket, or I.O.U., in order to prove the basis of the claim or right. Feinberg further characterises this use of the term 'claim' as 'performative claiming' (ibid.).

The second use mentioned by Feinberg - 'claiming that'- is given the title 'propositional claim' (ibid.,150). Clearly, Feinberg sees this use as weaker than the first type, 'making claim', for he argues that

> One important difference then between making legal claim to and claiming that is that the former is a legal performance with direct legal consequences whereas the latter is often a mere piece of descriptive commentary with no legal force (ibid.).

(Though Feinberg makes the point above in relation to legal claims, I think there is a sense in which this can be adapted to cover moral claims as well.) The comparative weakness of 'claiming that' is exemplified by Feinberg when he states that, 'Anyone can claim, of course, that this umbrella is yours, but only you or your representative can actually claim the umbrella.' (ibid.).

The third use of 'claim' underlined by Feinberg - 'having a claim' - is explained as follows: 'I would like to suggest that having a claim consists in being in a position to claim, that is, to make claim or claim that.' (ibid.,151). In speaking thus Feinberg is actually being critical of this way of speaking, since he goes on to say:

> If this suggestion is correct it shows the primacy of the verbal over the nominative forms. It links claims to a kind of activity and obviates the temptation to think of claims as things , on the model of coins, pencils, and other material possessions which we can carry in our hip pockets (ibid.).

Over all then, Feinberg's position on rights as claims stresses the activity of claiming, the 'performative' sense in which people actually demand their due. At a later stage I shall have to return to Feinberg's emphasis on claiming, and in the following sections some of the problems with the notion of rights as claims will be mentioned, but for now I shall remain content with the

statement of the uses of the language of claiming. In the next section I deal with a closely related concept - 'entitlement'.

B, Rights as 'Entitlements'

For the elucidation of the notion of rights as 'entitlements' it will be useful to turn to the work of the Australian philosopher, H.J. McCloskey. This author rejects the association between rights and claims, and insists instead on the close link between rights and entitlements (McCloskey,1965; 1976).

What is wrong with thinking of rights as claims? According to McCloskey, a right may provide a ground for claiming something, but it is not a claim in itself. He takes the example of the legal right to marry,

> My legal right to marry consists primarily in the recognition of my entitlement to marry and to have my act recognised. It indirectly gives rise to claims on others not to prevent me so acting, but it does not primarily consist in these claims (McCloskey,1965:116).

Another example found in McCloskey concerns the fundamental right to life. This, he says, is not a right against anyone, though it may imply duties on the part of others to refrain from killing me. ' But it is essentially a right of mine, not a list of claims, hypothetical and actual, against an infinite number of actual, potential, and as yet nonexistent beings.' (ibid.,118). Thus, McCloskey seems to think of rights as entitlements in the sense of possessions, as opposed to Feinberg's emphasis on the verbal form of claim. In effect, McCloskey's 'entitlements' are closely akin to Feinberg's third use of claim - 'having a claim'.

I think it is important at this stage to question this distinction between rights as claims and rights as entitlements. It is my feeling that 'claims' and 'entitlements' are closer in meaning than McCloskey is willing to admit. For instance, another author who defines rights in terms of entitlements, G. Marshall, has this to say: 'A right, it would be safe to say, is obviously a form of entitlement arising out of moral, social, political, or legal rules.' (Marshall,1973:228). And immediately after this definition Marshall informs his reader that the term 'entitlement' is to be preferred to that of 'claim', because claims are not always valid or justified.

Both McCloskey and Marshall have a point here, but it is a point that Feinberg and others who use the language of claim have in fact taken on board in their analysis of rights. Both Feinberg and Wasserstrom tend to use the terms 'claim' and 'entitlement' as practically synonymous. For instance, Wasserstrom moves back and forth between the two terms, as in the following,

> Perhaps the most obvious thing to be said about rights is that they are constitutive of the domain of entitlements. They help to define and serve to protect those things concerning which one can make a very special kind of claim - a claim of right (1964:10).

Feinberg, too, appears to use 'claim' and 'entitlement' interchangeably, as in the following,

> Generally speaking, only the person who has a title or who is qualified for it, or someone speaking in his name, can make claim to something as a matter of right. It is an important fact about rights (or claims), then, that they can be claimed only by those who have them (1970:150).

So Feinberg has to make a further distinction between mere claims that are not justified or valid, and valid or

justified claims. This should answer the anxiety of Marshall at least, since he was concerned that the ordinary use of the term 'claim' does not guarantee that the claim is always justified or valid. Feinberg sees the need to distinguish clearly between a claim understood as a demand and a valid claim where the demand is justified.

> A claim conceded even by its maker to have no validity is not a claim at all, but a mere demand. The highwayman, for example, demands his victim's money; but he hardly makes claim to it as rightfully his own (ibid.,152)

It seems reasonable to me at this stage to identify 'entitlement' with a special kind of claim - a 'valid claim'. And a right can be elucidated in terms of either 'entitlement' or 'valid claim'. The notion of 'entitlement' is not necessarily opposed to the notion of 'claim', but the former does help to point out the ambiguity in the latter concept, an ambiguity cleared up by the addition of the qualification 'valid' or 'justified'. (Cf. Beauchamp & Childress,1983:50, and Gillon,1985:54 who use the language of 'justified claims'.)

Before passing on to another term which elucidates the concept of rights, I must mention a further point where Feinberg's analysis of rights in terms of claims is an improvement on McCloskey's emphasis on entitlements. Feinberg insists that claims are always 'to' something and 'against' someone. But McCloskey's view of entitlement seems to play down the role of claims against others and to over-emphasise the role of claims to something. The drawback here is that this view of McCloskey's undermines to a great extent the important doctrine of the correlativity of rights and duties, a doctrine which insists on the fact that rights always involve a claim of some kind against another, a claim

which is experienced by the other in the form of a duty. However, McCloskey's viewpoint does help to remind one of the difficulty of connecting rights to particular duties and duty-bearers (cf. McCloskey,1965:118; Feinberg,1970: 154-155). In other words, McCloskey's stress on entitlements directs attention to some 'untidiness' in the correlativity between rights and duties. This is one of the major areas of controversy in the analysis of rights-language. to which I shall return before long.

C. Rights as 'Powers'

A philosopher who elucidates rights in terms of 'powers' is J.P. Plamenatz (1968). In his opinion,

> A right is a power which a creature ought to possess because its exercise by him is itself a good, or else because it is a means to what is good, and in the exercise of which all rational beings ought to protect him (Plamenatz,1968:82).

But what kind of power is involved here? McCloskey, who has already been seen as an opponent of claim-language, is also highly critical of attempts to elucidate rights in terms of 'powers'. For instance, he declares that the right to vote is an entitlement to vote, but does not necessarily imply the actual 'power' to vote. Think of a laxly policed state, he argues, where the 'power' to vote is merely notional and cannot be practised.(McCloskey,1965:116).

One could answer this criticism by pointing out in Plamenatz's quotation above that 'A right is a power which a creature ought to have'. It is not necessarily a power that one actually has. So Plamenatz could argue that the right to vote must include protection of citizens as they attempt to exercise their franchise. Such protection is a condition of the citizen having a

'power' to vote. Plamenatz shows in this quotation that he is primarily interested in the 'exercise' of rights as powers. But one must note here the distinction between '<u>exercising</u>' a right and '<u>having</u>' a right. In the matter of voting in an anarchic or insecure state, citizens have the right to vote, but find it difficult to exercise the right. Put in the language of 'powers' there is one sense in which the citizens have no power to vote, that is, no physical power to arrive safely at the polling booth; but there is still a sense in which these people have a power to vote, namely, a moral and legal power, which 'cries out' for recognition and protection. This point is brought out well in the following words of Michael Bertram Crowe (1978):

> A man's right to life can be described as his <u>moral</u> power to claim or demand that no one takes his life away. Normally, of course, a man is able to support this claim by physical force; he may repel an attack, using physical force to fight off his attacker. But we would easily recognise that the ability to fight off an attack is not the basis for his right to life. A champion boxer or a trained commando may be well able to use physical means to defend his life. But a handicapped or otherwise defenceless person, an infant, an old person, one who is paralysed for example, although unable physically to defend himself, has every bit as much a right to life as the strong man. What both the weak and the strong have in common is the <u>moral power</u> (that is, the right). And this moral power is far more important than the difference in their physical strength (Crowe,1978:4-5).

Exercising a right in the sense of achieving some particular justified end depends on one having a moral or legal power, that is a justification for acting in that particular way. And here I find myself back with the previous worked-out concepts of 'claim' and 'entitlement'. Indeed, Crowe mentioned in the quote above that 'A man's right to life is his <u>moral</u> power to claim or demand that no one takes his life away.' Thus, is added a further elucidation of the concept of right:

rights give a person a power to claim, where claiming is based on an entitlement to do something or have something done for one. 'Entitlement', 'valid claim', and 'moral or legal power' appear then to be practically synonymous on this analysis.

The concept of right as 'power' will come up again shortly, when I treat of an important theory of rights - the 'Choice' or 'Will' Theory.

D. Rights as 'Liberties'

There is much historical backing for seeing a connection between rights and 'liberties'. Alan White (1985), having mentioned in this regard the works of Hobbes and Spinoza, goes on to state:

> The plausibility of an equation of rights and liberties is strengthened by the fact that most of the famous Bills of Rights from Magna Carta to the United Nations Declaration of Human Rights mention and list, seemingly indifferently, both rights and liberties. Furthermore, the history of most struggles for human rights is largely an account of a fight for freedom against oppressive laws and governments (White,1985:134).

In speaking of the relationship between rights and 'liberties' or 'freedoms' it is important to distinguish between liberties as the objects of certain rights and liberties as part of the elucidation of the concept of rights. It makes sense to say that people have rights to certain liberties or freedoms, for instance, freedom of conscience, freedom to receive a decent education, and so forth. But in this section I am more interested in the sense in which the notion of right is elucidated by the notion of 'liberty/freedom'. By this I mean that a right can be understood as a freedom in the sense of an opportunity to achieve some particular value, as seen in

relation to the freedom of others.

Thus, I would see the concept of 'liberty' or 'freedom' in a special light pretty much related to the notions of 'power','entitlement', or 'claim'. Returning to McCloskey's example of the 'right to vote', this right seen as a 'liberty' has similar meaning to the notion of a 'power' to vote, an 'entitlement' to vote, a 'claim' to vote. Again, such a right is not to be taken as a de facto physical freedom to get to the polling station and cast one's vote, though this freedom is also sought, but as a moral or legal freedom which has a special power of its own, if only to challenge the consciences of others. Where a person's freedom or liberty in a particular area is justified, that person is free to claim, has a power to claim, and is entitled to claim, some value or good.

This section of general clarification and elucidation has been an effort to show important links between the various terms used in the everyday language of rights. Although some philosophers have their preferences for some specific uses, and are critical of other uses, my position has involved an attempt to harmonise the various meteaethical treatments, such that in analysing the basic terms in a certain way they are seen as mutually complementary in drawing out the meaning of rights-language.

1.3 Specific Analysis of Rights-Language

It is a major aim of this thesis to suggest that Christian ethics can benefit greatly from paying attention to the detailed analysis of rights-language which is to be found in moral philosophy and jurisprudence or philosophy of law. This is the main reason why this first chapter has been so heavily analytical. My next step is to take some of the terms

already elucidated in a general manner, and to look at them in a more technical context. Firstly, I shall note the technical meanings given to the terms 'claim', 'liberty', 'power' and 'immunity' within the legal sphere, especially in the work of the distinguished American jurist, Wesley Hohfeld (1919). Then, secondly, I shall attempt to translate these specialised terms into the moral sphere, since it is the reality of moral rights that concerns me most in this thesis.

A. The Hohfeldian Distinctions

In an article published in 1977, T.D.Perry suggests that Hohfeld's work on the analysis of rights-language is 'A Paradigm of Philosophy' (Perry,1977). 'A paradigm', he says, 'gives exactness of analysis and solving or illuminating power' (Perry,1977:41). What is paradigmatic about Hohfeld's analysis of rights? The answer seems to be given by Samuel Stoljar (1984) in his analysis of the Hohfeldian distinctions:

> Hohfeld was certainly not the first to recognise 'right' as a very ambiguous word, but his was the first attempt to sort out the meanings systematically. Arranging rights according to their various correlatives and opposites, he divided them into two squares: one based on claims and liberties, the other comprising powers and immunities (Stoljar,1984:51).

It is generally agreed that, for Hohfeld, the square consisting of claims and liberties was of primary importance (Hohfeld,1919:36ff.). 'Claims' are in fact 'rights' in the strict sense, and must be distinguished carefully from 'liberties' as well as from the other legal concepts, 'powers' and 'immunities'. A person has a claim to something against another in so far as the other person has a duty to the right-holder regarding that object. John Finnis expresses this point technically

when he states that, 'to assert a Hohfeldian right is to assert a three-term relation between one person, one act-description, and one other person.' (Finnis,1980:199). Another way of stating Hohfeld's formulation of 'right-claims' is to say that he holds the strictest doctrine of the correlativity of rights and duties here.

If claim-rights are rights in the strict sense, what then of the other half of the square - liberty-rights, or what Hohfeld called 'privileges'? I shall let Stoljar explain the difference: 'Now rights and liberties are distinguished because they are rights with different correlatives and opposites.' (Stoljar,1984:51). Claims are correlative with duties in a strict sense, but this is not the case with liberties, as Stoljar explains:

> In the case of a liberty, the respective incidents are different. Instead of asserting a right in X together with a duty in Y, we rather assert, Hohfeld thinks, that X has a right to do p in the sense of having a liberty to do what he is doing without X having any corresponding claims against Y since Y is under no correlative duty toward X (op.cit.,51-52).

Let me give some examples of each kind of right to illustrate the differences between them. A typical claim-right would be any of the so-called 'special moral rights' (cf. Hart,1955:84), those rights which arise from entering into an agreement with another person either by promise or contract. If I borrow some money from a friend and agree to repay it within a certain period, then I give my friend a right to expect the return of the loan. He can claim against me, and, correlatively, I have a duty to repay as I promised I would. In other words, I have no liberty to refrain from repaying the loan so long as my friend holds me to my duty. My freedom is strictly limited by my friend's claim-right. Similarly in the category of rights which are called 'human rights' (Hart calls these 'general rights' to

distinguish them from 'special rights', 1955:87), the values involved are so important that the link between right and duty is usually regarded as quite strict. In fact, human rights are often said to be 'inalienable', that is, they cannot be waived by the right-holder, and the correlative duty-bearer cannot be released from his duty or obligation.

Turning now to liberty-rights, one sees at once that the connection between the right-holder and others regarding the value sought by the former is much looser than in the case of strict rights or claims. For instance, my right to look at my neighbour over the garden wall is a common liberty-right. I have no duty in ordinary circumstances to refrain from looking at my neighbour. However, my neighbour has no correlative duty to make himself available to be looked at by me; he can stay indoors if he so wishes. Furthermore, my neighbour can obstruct my liberty to look at him, again within reason, by, for instance, erecting a screen beside his wall. Other common examples of liberties involve situations such as two persons seeing a sum of money on the ground, such that each has the liberty-right to pick it up. Each person has 'no duty not to' pick up the money, and neither person is obliged to give way to the other in attempting to possess the object (cf. Hart,1955:81).

This last case is important, since it provides an example where liberty-rights are most useful in everyday life. The area involved is that of 'economic competition'. As Hart puts it, 'The moral propriety of all economic competition implies this minimum sense of 'a right' in which to say that 'X has a right to' means merely that X is under no 'duty' not to.' (ibid.). Consider, for instance, economic competition between shop-keepers. If I open up a shop in a certain line of business near another shop involved in the same kind of

trade, I may (if I am efficient enough) damage my fellow shop-keeper's business. However, I am at liberty to do so, given the rules of fair competition. Presumably, of course, one has no intention to damage another from personal, malicious motives; one simply goes about one's own work, and other businesses in the vicinity suffer as a result of one's legitimate efforts. Competitors cannot complain that fellow-competitors are failing in their duties in the very activity of being in competition, once this is kept within certain limits, because there is no duty to avoid entering into competition in the normal course of events. So, paradoxically, there is a right which people have in certain circumstances which actually permits them to harm others in going about their legitimate business.

It was in fact an example from this sphere of economic competition which Hohfeld concentrated upon in criticising legal confusion between claims and liberties. In the case of Quinn v Leathem (1901) A.C.,495,534 (Hohfeld,1919:42-43), the plaintiff, Leathem was a butcher who was pressurised by a trade union (represented by Quinn) to sack all his non-union members and to employ in their place unionised workers. The union tried to achieve this end by pressurising a customer of Leathem's not to deal with him, as a result of which Leathem suffered financial damage, for which he demanded and received compensation.

Lord Lindley gave as reason for judging in favour of Leathem the general right everyone has to pursue whatever lawful business or employment he or she chooses. According to Lindley, this right implied a correlative duty on the part of others not to interfere in another's legal business without lawful justification. Hohfeld, however, argued that the 'right' in question was not a claim-right but a liberty-right. Thus the defendants had no right against Leathem that he refrain from going about

his lawful business, but this did not include a positive duty committing them to non-interference.

Stoljar explains the fallacy Hohfeld considered had been made in this judgement as follows:

> Hohfeld's view was that the court here confused the plaintiff's liberty with his right to carry on business; the court committed a non sequitur in concluding that because the plaintiff undoubtedly had a liberty to pursue his business, he therefore had a right to pursue it; the fallacy was to transform a liberty, the correlative of which was only a no-right, into a right with a corresponding duty not to interfere (1984:52-53).

There is some doubt whether Hohfeld was correct in this interpretation of the court's decision, but I shall allow his interpretation to stand for the present, simply as an illustration of the distinction between a claim and a liberty in practice.

As well as distinguishing between claim-rights and liberty-rights, Hohfeld presented another square, this time including the distinction between 'powers' and 'immunities' (op.cit.,50-64). Again, as in the square of claims and liberties, this is a square of jural opposites and correlatives. Claims are correlative with duties, and are opposed to no-rights. Liberties are correlative with no-rights, and are opposed to duties. What then of powers and immunities?

J.W.Harris (1980) gives a short account of the elements of this second square:

> To say that A has a power entails that he can by his voluntary act change the legal relations of some other person, B, who has the correlative liability; and that it is not true that A has a disability as against B's legal relation, correlating with an immunity of B (Harris,1980:77).

The main example which Harris gives of these relation-

ships in practice is that of a man, A, sending a letter to B. The context of this letter from A to B is a previous letter from B to A making A a specific offer. A's letter is an acceptance of the offer in the form of a contract. In this way, A has a power to enter into the contract and B has a correlative liability to have certain contractual relations created. It also follows that if A has a power to enter into a contract, he must not suffer from any disability in doing so - this is one of the jural opposites. And if B has a liability correlative to A's power, B cannot have an immunity against A. Unless one voluntarily enters into a contract or makes a promise, one has an immunity-right against others not to take on the contractual relations. This right protects one in particular from the paternalistic interventions of others.

B. An Ethical Translation of the Hohfeldian Distinctions

The question now to be faced is how the legal distinctions just discussed can be translated into the moral sphere? After all, this thesis is mainly concerned with moral rights, though much of the analysis so far covers material which is a basic common denominator underlying all rights-talk. Can the Hohfeldian distinctions be applied morally? One philosopher who answers affirmatively is Carl Wellman. Here is a brief summary of his approach to this question:

> Just as a legal right is a complex system of legal advantages, so an ethical right is a complex system of ethical advantages, a cluster of ethical liberties, claims, powers and immunities. At the centre of every ethical right stands some unifying core, one or more ethical advantages that define the essential content of the right. Thus, at the centre of my ethical right to dress as I please is my ethical liberty of wearing in public any decent clothing I wish, and the core of my ethical right to protection of the laws is my ethical claim against

> the state that its legal system afford me just as much protection as it affords any other individual subject to it. Around the core of any ethical right cluster an assortment of associated ethical liberties, claims, powers and immunities. What ties these ethical elements together into a single right is the way in which each associated element contributes some sort of freedom or control to the possessor of the right. Because freedom and control are two aspects of autonomy, any ethical right can accurately be thought of as a system of ethical autonomy (Wellman,1978:55).

The terms 'core' and 'cluster' bring out the central features of Wellman's theory. A situation which involves rights cannot usually be reduced to one legal or ethical relationship, but typically I may isolate some core concept or relation which is primary and around which the other legal or ethical relationships cluster in support. The core concept of a right tells me the kind of protection I can expect for my interests in that area. Thus if someone owes me a sum of money, the core right is a claim against that person. Then if that person refuses to repay me, I may exercise my ethical power to seek compensation, either through the legal system or through moral suasion. Furthermore, I can argue that no other party has the ethical power to stop me from from claiming or using my ethical power to seek redress - this is what is called an ethical immunity. Then again, I may have the ethical liberty to waive the payment of the sum of money.

Each of the Hohfeldian distinctions, with its correlative and opposite, can be translated into the ethical sphere. Ethical claims are correlative with ethical duties, and their opposites are no-rights. Ethical liberties are correlative with no-rights, and their opposites are duties. Ethical powers are correlative with liabilities, and opposed to disabilities. Immunities are correlative with disabilities, and are opposed to liabilities. In these cases it becomes clear that the essence of a right is some kind of

relationship of advantage before another. No wonder Wellman can say that:

> No one who has studied Hohfeld can imagine for a moment that the content of the right to life is simply life. He forces us to ask whether the right to life is essentially the liberty to defend one's life when under attack or the claim against being killed by another or the power to sue in the courts for legal protection of one's life or all of these or none of them (ibid.51).

Yet often when one reads literature on the subject of rights the impression is given that the content of rights is simply the good or value in need of protection, when the emphasis should be placed on the kind and degree of protection that is sought, and the appropriateness of such protection for that particular value. This point will be made again and again in this thesis; in fact, it has already been made a number of times, as in Feinberg's insistence that rights are both claims to something and claims against somebody; and recall Finnis's remark that rights 'assert a three-term relation between one person, one act-description, and one other person (Finnis, 1980: 199).

1.4 Some Controversies in the Analysis of Rights

Already in section 1.2, the general analysis of rights-language, some disagreement was noted concerning the appropriateness of certain common terms used to elucidate rights. In section 1.3, the more technical analysis of rights-language in terms of the Hohfeldian distinctions, I held back from including the disagreements on the appropriateness of these legal and ethical concepts. This was done in order to avoid making the section too long and to avoid confusion over technical terms. At this stage, however, it may be worthwhile to mention a few difficulties regarding the analysis of rights and

rights-language given so far.

A The Correlativity of Rights and Duties

The centrality of this doctrine in discussions of rights-language has been hinted at already. Feinberg's 'claims against' seem to suggest some binding force concerning others in relation to one's interests. Hohfeld's 'claim-rights' are said to be rights 'in the strict sense', and are defined in terms of another's obligation or duty. Downie and Telfer state that 'rights and obligations are opposite sides of the same coin: if there is a duty to treat people in a certain way they thereby have a right to be so treated.' (Downie & Telfer,1980:41). There are many other examples of both philosophers and theologians taking this correlativity for granted, for instance, Raphael,1965:206; Benn & Peters,1959:Ch.4; Grisez,1983: 264-265; Knudsen,n.d..:179. However, this doctrine has also been heavily criticised in recent years.

Before actually discussing some of the problems of correlativity I must warn the reader of further complications which arise from the point of view of duties and obligations. In first place, some philosophers distinguish between 'duties' and 'obligations'. For instance, C.H.Whitely (1953) argues that the moral philosophical sense of both duty and obligation is related to the right thing to do in the sense of the best thing to do, or what a virtuous man would do. But, he argues, there is another sense in which duties and obligations are related to particular roles; think of the duties of one's station or one's state in life, what society expects of one. The two meanings are not synonymous, since there is no contradiction in saying that a person ought not to do his duty in one sense of that word. This is the case because sometimes what is expected of people in certain roles is

judged to be morally wrong (Whitely,1953:95-104; and cf. White,1984:Chs.3&4, especially 51-53).

To make matters more complicated, Alan White (1984) insists that one make further distinctions between 'having an obligation', 'being obliged', and 'ought' (White,1984:Ch.4). Feinberg, in one of his studies of the correlativity of rights and duties, reminds the reader of the complexity of the concept of duty as well as that of right, since he gives nine different types of duty, and attempts to relate them to rights (Feinberg,1966:137-144). Hart, too, recognises the need to distinguish between 'duty' and 'obligation'. He declares that ' 'duty', 'obligation', 'right', and 'good' come from different segments of morality, concern different types of conduct, and make different types of moral criticism or evaluation.'(Hart,1955:80,note 7). For my purposes here I shall ignore the distinctions between duties and obligations, and between the notions of 'ought', having an obligation', and 'being obliged', as they are not central to the kinds of criticism I shall be mentioning with regard to correlativity of rights and duties.

The strictest correlativity between rights and duties would hold that for every right there is a duty and for every duty a right. I think that such a doctrine would be difficult to defend. In my opinion, the stronger correlativity lies between rights and duties rather than between duties and rights. In other words, all rights involve some duty on the part of another or others, but not all duties entail rights on the part of others.

What duties do not entail correlative rights? One example might be duties of beneficence or of charity. These are sometimes called duties of 'imperfect obligation'. John Stuart Mill (1861) explains this reality:

> Now it is known that ethical writers divide moral duties into classes, denoted by the ill-chosen expressions, duties of perfect and of imperfect obligation; the latter being those in which, though the act is obligatory, the particular occasions of performing it are left to our choice; as in the case of charity or beneficence, which we are indeed bound to practise, but not towards any definite person, nor at any prescribed time. In the more precise language of philosophical purists, duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right (Mill,1861:304-305).

It seems to me that Mill's distinction applies well enough to the relationship between citizens of developed lands and their poorer brothers and sisters in the so-called 'developing countries'. Those who are reasonably well-off in the Western world seem to have some duty to share at least part of their surplus earnings with the poor of the Third World, but given the number of people and the number of regions in need at any one time, it is practically impossible to situate a strict relationship of duty and right between a householder in Britain, say, and a refugee in the Sudan or Ethiopia. The only exception I can think of to this rule would be in cases where a wealthy country developed its wealth partly from a poor country during a colonial era, and now owes some restitution (cf.O'Neill,1986:110-113).

There are other examples, too, of duties which do not appear to be correlated with rights, though some of these cases are controversial. One might argue for instance that humans have duties to animals, while denying that animals have rights. Some philosophers have stood in favour of the 'rights' of animals (Regan,1985:13-26; Feinberg,1974:159-184), while others have denied the attribution of rights to animals (Grice,1967:147-148; McCloskey,1965:123-124; Finnis,1980:194-195). One way

of getting around the duty/right correlation here might be to use McCloskey's distinction between 'duties to' and 'duties concerning' (McCloskey,1965:122,note). I can have a duty to someone, but not to an animal. Here, the 'duty to' concept involves a personal relationship which is characteristic of the duty/right correlation. However, I can have a duty concerning an animal (and McCloskey includes things,eg. paintings and art) which would not entail a correlative right, because of the impossibility (by definition) of having an interpersonal relationship with an animal.

Other examples of duties without correlative rights are given by White, some of which are decidedly odd and unconvincing. Thus, he says that the judge has a duty to punish an offender, but this does not entail a correlative right. True enough, it would be odd to say that an offender has a right to be punished, but it is quite sensible to say that a judge has a duty to punish someone which is correlative to the rights of citizens to be protected from criminal elements (White,1985:60-61). He also says that a prisoner of war's duty to escape does not imply his captor's right to help him to escape, but this is to miss out on the fact that the escapee's right is most likely against fellow prisoners who might be opposed to the escape plan and in favour of submitting to the enemy regime (ibid.,61).

Perhaps there is more sense in his examples of a duty to bury the dead - with no correlative right on the part of the dead? And he thinks that a person's duty to himself does not have a correlative right (White,1985:62; cf. McCloskey,1965:122, who criticises the notion of a duty to oneself). If one has a duty to oneself, does this mean that one can waive one's right against oneself? This seems very odd indeed. Nevertheless, such examples do suggest that there will be difficulties often in correlating duties with rights, at least in a one-to-one

correspondence.

One final example confirms this: in the case of Johnson v Phillips [1975] 3 All ER 682, it was judged that 'the duty of the police to promote free flow of traffic was a reason for holding that a constable could (in an emergency) order a man to drive the wrong way down a one-way street.' (Harris,1980:82-83). Here a general duty is hardly correlative with a general right to drive down one-way streets the wrong way, and in the particular case of a police officer ordering someone to do this, the 'right' of the driver is a most unusual privilege or permission.

From the point of view of rights correlative with duties, there have been some voices of dissent from the strict view that all rights entail duties. One such voice has been that of David Lyons, who points out that correlativity works well enough in cases of Hohfeldian claim-rights, but not so well in cases of Hohfeldian liberty-rights (Lyons,1970).

For Lyons, claim-rights are exemplified in contracts and promises which give rise to special moral rights. These rights are the paradigm of correlativity, according to Lyons, because of the relation between the content of the right and the content of the duty:

> Rights and duties not only connect ordered pairs (or sets) of persons; they also have contents. By "contents" I mean, what it is that A has a right to and what it is that B has a duty or obligation to do. These also must have a definite relation if we are to be able to infer the right or the obligation from the other directly, and a fortiori if rights and duties are to be regarded, even in this limited class of cases, as conceptual correlatives (Lyons,1970:47).

An example of the connection between the contents of a right and a duty is where one person owes a sum of money

to another. In a case like this Lyons would say that 'the content of the right is related to the expression of the content of the obligation as the passive is related to the active voice.' (ibid.,48). In respecting the right of A, B gives the money to A (active voice), and A receives the money from B (passive voice), who thus discharges his duty to A.

Once the paradigm of correlativity is understood, Lyons considers cases that fall away from this paradigm. Most obviously this occurs, he thinks, in the case of liberty-rights. He takes what he considers to be a typical liberty - the 'right' to freedom of speech. A liberty-right is defined in terms of a person having no duty not to do something, and the correlative entails that others have no right that the right-holder refrain from so acting if she wishes. But Lyons's point is that the freedom to speak is not supported by a real right against others, since others have no duty to listen to a stranger speak (but note the position of Paul Ramsey (1950:360-361) where he holds that 'Individuals have a right to speak freely because society has a right to hear freely from all its members', and he follows this by claiming that 'Any right is also a duty.' Thus, Ramsey is claiming that there is a strict correlativity between the right of free speech and the duty to listen.).

In fact, the general possession of this liberty seems to allow for others to heckle and interrupt one's speech if they so wish. Surely there is some protection of this liberty in terms of correlative duties? Surely, a person speaking in public in ordinary circumstances cannot be gagged forcibly? Indeed, a person has a right not to be gagged or assaulted; in fact, this a strict claim-right rather than a liberty. The point about this, however, is that such a claim-right has little to do directly with the liberty-right to speak freely. Lyons argues that the right not to be gagged or assaulted is part of a general

right not to be attacked, and this could conceivably remain as a right if the right to freedom of speech were withdrawn. So there seems to be no strict duty correlative to the right of freedom of speech as such, and the content of that liberty-right is not mirrored by the content of a particular duty towards the right-holder,as is supposed to occur for strict correlativity to exist.

In reply to Lyons, David Braybrooke makes a number of points. In fact, the title of his article, 'The Firm but Untidy Correlation of Rights and Obligations' reveals something of his basic position on this question. He says of Lyons's position:

> There are clear signs in Lyons's work of a tendency to take for real the tidy consequences that would be features of social life if men's actions and institutions fulfilled certain ideals of logical economy (Braybrooke,1972:352).

Braybrooke insists that Lyons has missed out on the 'open texture' (a terminology borrowed from F. Waismann (1949),cf. Hart,1983:274-275) of the concept of the correlativity of a right and an obligation. For instance, in relation to the right to freedom of speech, there are corresponding obligations that can be worked out in a normative ethical system. And these obligations are not simply to refrain from assault; they also could include the duty to avoid extravagant heckling, or jamming loudspeakers. He asks if flying a sky-writing airplane might not be considered as a violation of this liberty-right, or, in the case of an indoor meeting, turning up the thermostat (Braybrooke,1972:358-360; for an opposing opinion on these points, cf.Frey,1983:78)? Braybrooke argues that this open texture with regard to the content of obligations correlative with rights may be an advantage by allowing further precedents to be entered into the legal system. Clearly, rights like that of free-

dom of speech are more complicated in their operation than the right to be repaid a loan. In the latter case either the sum of money is repaid or withheld, whereas in the former case the freedom to speak may be respected or not respected in various degrees, simply because each person has an equal right, a fact which leads to the problem of arbitrating between conflicting freedoms or liberties.

It is worth noting here Braybrooke's argument for the firm correlation between rights and duties, a correlation which remains firm in spite of the untidiness of the connection. Any right must involve some protection for the right-holder, and duties provide such a protection. Consider, he says, a person testifying that N has the right to do X, e.g. to speak in public freely. The witness is asked to consider all sorts of actions interfering with N's right: threats, assaults, extravagant heckling, and so forth. In every case she denies that people acting in that way fail in their duty to N. In effect, the witness refuses to agree that they ought to refrain from interfering with N. But in saying all this she makes the original claim concerning N's right empty (ibid.,361). Hence every right must have some correlation with some duty, even though the exact correlation may be difficult to establish.

Earlier, I mentioned duties of beneficence or of charity and the difficulty of linking these to individual rights. Looked at from the angle of rights this also presents a problem of correlation. Feinberg, for instance, argues that statesmen often use the term 'claim' in a special sense, a 'manifesto sense' of 'right'. As he puts it,

> The manifesto writers on the other side who seem to identify needs, or at least basic needs, with what they call "human rights," are more properly described, I think, as urging upon the world com-

> munity the moral principle that all basic human needs ought to be recognised as claims (in the customary prima facie sense) worthy of sympathy and serious consideration right now, even though, in many cases, they cannot yet plausibly be treated as valid claims, that is, as grounds of any other people's duties (1970:153).

I am not sure that I agree with Feinberg when he says that these 'manifesto rights' are not valid claims. It seems to me that they are valid, but that these rights cannot be exercised at present. Morally speaking basic human needs ought to be fulfilled, and insofar as they are not at present fulfilled it is arguable that human injustice is a contributory factor. It seems quite appropriate to me that manifesto rights to food in the face of starvation entail some duties on the part of the so-called 'Superpowers' who spend so much human resources on weapons of destruction. And if this remark sounds too general, I think it may be made more specific and applied to individual citizens of the developed countries - to put pressure on politicians to consider the poor of the world, and not just narrow national issues. If democracy means anything, surely it requires this kind of responsibility. However, all this said, it will have to be recognised that many of the poorer inhabitants of the world will not be able to exercise their manifesto rights for some time, due in part to the unwillingness of people in the developed lands to recognise correlative duties. It takes some degree of wisdom to see how individual duties here in the West are correlated with rights in the Third World.

B. The Value of Liberties

The sense of 'liberty' I want to discuss here is again the technical Hohfeldian one, whereby a party has no duty not to do something. The correlative is usually seen as a 'no-right', in the sense that others have no claim against me if I act in accordance with my liberty. The

shopkeeper next door has no right against me if I start a business in competition with his; each of us has an equal liberty-right in the eyes of the law, and it is simply a question of co-existing or 'Let the best man win'.

There have been some criticisms levelled at this statement of 'liberty-rights'. Firstly, Hohfeld is often criticised for entitling liberty-rights 'privileges'. Glanville Williams (1956) explains that in the usual sense of the term a privilege is a permission given to a single person or a few people, it cannot be given to all; but a liberty may be possessed by all, e.g. freedom of speech (Williams,1956:1131-1132). Secondly, the correlatives and opposites mentioned by Hohfeld regarding liberties/privileges have been corrected. Where Hohfeld stated that a liberty was correlative with a no-right and opposed to duty, Williams corrects this, saying that the correlative of liberty is in fact a 'no-right-not', while the opposite of liberty is not necessarily a duty, since a party may have a liberty to do his duty (ibid.,1135ff).

An example of the correlation between liberty and no-right-not is a father's right to chastise his child. This is a liberty-right in that the father has no duty not to chastise his child. But the correlative to this in the case of the child is that the child has no right not to be chastised. Regarding the relation between liberty and duty, it is not always the case that these are opposed. Williams tells his readers that there is a different use of the term 'liberty' between law and philosophy. In legal circles a liberty may not involve any choice: 'the lawyer can accept as a liberty what is simply an absence of duty to act otherwise.' (Williams,ibid.,1139). And he insists that it follows that there is a liberty to perform a legal duty.

I believe that in moral philosophy and in moral theology there may be a similar liberty to do just one

thing, the right thing, and that this involves the basic choice between good and evil. In fact, by definition a liberty involves having no duty not to do something and this is perfectly compatible logically with having a duty to do the same thing. My duty to respect the life of others is compatible with my having no duty not to do this. Thus, there seems to be two different senses of liberty: one is the usual sense of liberty of indifference in which it does not matter whether I do X or not; the other being the sense in which I must do X if I am to respect my moral and/or legal freedom. If this sounds rather abstract, let me mention another example from Williams to make the distinctions concrete.

When a prisoner has completed his sentence, the warden may say to him 'You are at liberty to go'. On one hand this means that the prisoner has no duty not to leave; he will not be committing a criminal offence by leaving. But in addition to this he has no right to stay on at the state's expense. He is not free to stay. In such a case liberty is not opposed to duty but implies both absence of duty (to stay) and positive duty (to leave) (ibid.,1140ff.).

Hohfeld framed his distinctions, not as an academic exercise, but in order that judges and lawyers might use the distinctions in practice, thus bringing a certain uniformity and clarity into legal language in the courts. In this context he criticised the decision in Quinn v Leathem for its supposed confusion of claims as strict rights with liberties. However, this criticism has itself been criticised as ill-founded. Stoljar has said that Hohfeld was attacking what he thought was a fallacy, namely, 'to transform a liberty, the correlative of which was only a no-right, into a right with a corresponding duty not to interfere.' (Stoljar,1984:52-53). Now Stoljar goes on to give his verdict on Hohfeld's position:

> But, looking again, there was in fact no fallacy. The court was not at all concerned with liberties, whose correlatives are no-rights, but with liberties alias rights whose correlatives are duties. What purpose would have been served to identify a no-right rather than a duty? The question was whether the union officials had or had not broken a duty by doing something injurious...(ibid.,53).

In this passage it seems to me that Stoljar has either moved from the technical sense of liberty to the more general sense I used earlier, or else he is denying there is any real distinction between liberties and claims in the Hohfeldian, technical sense. In my opinion, the court in this case recognised Leathem's right as more than a liberty-right. The judgement seems to recognise his claim-right to pursue his business against the union. And this makes sense because the union was judged to have transgressed the limits of its own duty to improve the conditions of its members. Claim-rights and Liberty-rights to carry on one's lawful business only work when one operates within certain limits. Within these limits one can even harm another to an extent indirectly, as a result of fair competition. But if one oversteps these limits of just competition, one violates not merely the liberties of others but their claim-rights. Remember in this case that Leathem eventually agreed with the union that his workers could become unionised, but the union demanded that his workers be sacked as an example to others , while already unonised workers took over their jobs. This point, together with the pressure put on Leathem's customers to support the union, convinced the judges that the union had far transgressed the limits of its right. As a result, the court felt itself justified in using the strict language of claims, though this technical sense of the word was not actually used (cf. Hudson & Husak,1980:45-53).

This discussion of claims and liberties brings me to a more basic problem - the value of liberties in the first

place. If rights are supposed to protect one's freedom to act or not to act, what protection do liberties really give? The legal case just discussed brings into question the value of liberties as protection. If my liberty means that others have no real duty of non-interference in my regard, and even have permission to harm me indirectly in following out their own projects, what advantage is there in calling a liberty a right.

Some efforts have been made to attach protection to liberties. H.L.A. Hart, for instance, has suggested that liberties have a 'protective perimeter' which gives some 'security against the cruder forms of interference,' e.g. assault or trespass (Hart,1973:179-180). He mentions Bentham's distinction between 'naked rights' and 'vested/established rights': the former are liberties without the perimeter of protective obligations; the latter are liberties with this perimeter (ibid.,181). A somewhat similar distinction is found in Williams's article cited already. There he distinguishes between a 'protected liberty' and a 'bare liberty': the former is exemplified in situations where a statute expressly enacts that it will be lawful to do something; the latter refers to situations where the statute book simply refrains from from forbidding the conduct in question (op, cit.,1150). In the legal world, then, the language of liberty is used in a strong and a weak sense from the point of view of limiting the freedom of others.

The danger here, it seems to me, is that the strong sense of liberty may easily become a claim-right with correlative duties, while, on the other hand, the weak sense loses the meaning of a right altogether because of the absence of any real protection for the liberty-holder. Still, there is some sense in maintaining the language of liberty-rights, for application to certain situations of competition and conflict, where each party is justified in pursuing his or her own projects to the

detriment of others. It is very much a laissez-faire type of legal and moral reality, since my liberty offers me a minimum of protection vis-a-vis others. However, this minimum is still important; it amounts to a basic claim against others to permit me to carry on my project within set limits. It does not, however, amount to a claim that others help me in my projects or that they refrain from harming me indirectly in their own pursuit of similar goods.

C. Some Problems with Powers and Immunities

I shall not spend much time on these Hohfeldian distinctions, mainly because they are widely regarded as secondary to the the square involving claims and liberties. (I shall show the importance of powers and immunities in more detail in the second part of this work in relation to marriage and parenthood.) Hohfeld clearly saw powers and immunities as very different from strict rights and liberties. The main difference can be seen in the case of powers, where unlike rights, which have to do with basic relations, they have to do with changes in legal relations brought about by a party with some sort of superior control in the situation (cf. Stoljar,1984:59; Hohfeld,1919:50-60). Many of Hohfeld's examples centre on disposal of property by the owner: either abandoning it, or selling it, or giving it away. But Hohfeld does not want to speak of these legal relations as rights. Stoljar criticises this position. He cannot see why the power to abandon one's property should not be called a right. He argues that 'a right of disposition, a general jus disponendi , is implied in the right of property, the proprietor having a right in rem against interference whatever he does with his own res, in his own interest.' (Stoljar,1984:59). Thus, it seems to me that the concept of 'power' can be understood as a right, a capacity to change a relationship legally or morally. For instance, the moral and legal capacity a

person has to enter into marriage, and afterwards to found a family, can be entitled a 'power'. It is typically a capacity to enter into further moral and legal relationships, involving claims, liberties, and immunities.

Some criticism has been levelled at Hohfeldian analysis of powers based on the insistence that liabilities are incurred only through the exercise of powers understood as voluntary acts of another. Harris finds fault with this; he gives the example of a tree on one's property struck by lightning, and which 'brings about a new duty to take care'. He then asks, 'Before the lightning struck, was I not subject to a 'liability' which did not correlate with a 'power'?' (Harris,1980:81). In other words, the correlation between powers and liabilities is not as tidy as Hohfeld made it out to be. Moreover, the term 'liability' seems decidedly odd when used in situations where a person receives an inheritance. This person is 'liable' to have his legal relations changed by some other's 'power' . This is another example of legal language diverging from common usage.

Finally, a brief word to note that the concept of 'immunity' is not totally free from controversy or disagreement concerning its proper analysis. An immunity is supposed to be the opposite of a liability. It means that a party has protection against having her legal relations changed. The correlative legal relation is supposed to be a 'disability', the opposite of a power. But note here that the correlative disability is in fact a 'duty not' to interfere in a person's legal relations. If this is the case, then an immunity-right appears to be a type of claim-right, rather than a distinct legal relationship. Thus Stoljar admits that 'In this light the word disability seems highly expendable; normatively it can indeed be given up without qualms.' (op. cit.,62).

As in the case of liberties discussed above, it would appear that immunity-rights involve some kind of claim in certain restricted circumstances. Later in this thesis, there will be some application of this right-type in relation to legal and moral paternalism.

1.5 Two Theories of Rights

Let me introduce these basic theories of the essence of rights by means of one further criticism sometimes voiced against Hohfeld. As Harris expresses it:

> In particular, it can be urged that Hohfeld's analytic squares fail to bring out the essence of the concept of a legal right. He says that we should distinguish four senses in which the word 'right' is sometimes used - right, privilege, power, immunity - but does not pose the question whether there is some underlying idea which explains all these uses. He does not take sides in the time-honoured debate between those who favour a 'will' or an 'interest' conception of 'right'. These schools are represented in modern British legal philosophy by Professor Hart and Professor MacCormick (Harris,1980:85).

A The Choice Theory

Hart presents his 'Will' or 'Choice' theory in these words:

> The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed (1973:192).

Hart then goes on to say that the fullest measure of control over the duty of another comprises three elements. First, the right-holder may waive or extinguish the duty,

or leave it in existence. Second, after a breach or threatened breach of duty, the right-holder may leave it unenforced, or she may enforce it by suing for compensation. Third, the party may waive or extinguish the obligation to pay the compensation to which the breach gives rise (ibid.,192-193). The emphasis, then, is on the control of another's duty, such that duties with their correlative rights 'are a species of normative property belonging to the right-holder' (ibid.,193).

A major advantage of this approach to rights is that it allows for some flexibility in the normative relationship between persons, segments of whose lives are joined by rights and duties (cf. Melden,1977:ch.2). The concept of waiving a right is of utmost importance, especially in view of the reality of frequent conflicts of rights.

Unfortunately, however, the disadvantages of the 'Choice' or 'Will' theory are quite serious, so much so that Hart has moved away from this position in recent years (cf.Hart,1983:17; Waldron,1985:292). Some of these disadvantages have been listed by G. Marshall (1973). For one thing, Hart's theory seems to apply more to the sphere of civil law than to criminal law, since in the latter one's freedom to waive rights is limited by the legal system (Marshall,1973:234). Another example are the rights one has in playing certain games, where rights follow on from specific regulations. Thus, the football player cannot waive his right not to be tripped (ibid.,236). There are some things, then, which one does not feel ought to be a matter of free choice. There are important values which one must respect in one's own life as well as in the lives of others. Sometimes such values are said to be the objects of 'inalienable rights', rights that one cannot waive or relinquish (for a discussion of inalienable rights, cf. Frankena,1955; Richards,1969).

Finally, Hart's theory does not cater for the rights of children and the severely mentally handicapped, since these have no capacity to control the duties of others in their regard. Interestingly, Carl Wellman takes the Choice theory to its logical extreme in his discussion of consent to medical research on children (Wellman,1979). He denies that very young children have moral or human rights, and states that parents' consent to research on their offspring is really a matter of their waiving their own right that others not interfere in the process of caring for their children. As he puts it, 'Parental consent is not a proxy consent for the child, but an act of waiving the parent's own right that others not interfere with the parental activity of caring for the child.' (Wellman,1979:103). (Cf.Grice,1967:147-148, who concludes that 'It is an inescapable consequence of the thesis presented in these pages that certain classes cannot have natural rights: animals, the human embryo, future generations, lunatics, and children under the age of,say, ten.')

B The Benefit Theory

The 'Benefit' or 'Interest' theory of rights has been associated with the names of a number of philosophers and legal thinkers, especially N. MacCormick (1976), J. Raz,(1984), D.Lyons (1969), and in the past with Bentham (cf. Hart,1973). This is how MacCormick expresses the theory:

> To ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C, and that T is a good of such importance that it would be wrong to deny it or withhold it from any member of C (MacCormick,1976:311).

MacCormick uses the example of children's rights to apply his theory in practice. He holds that 'at least

from birth, every child has a right to be nurtured, cared for, and, if possible, loved, until such time as he or she is capable of caring for himself or herself.' (MacCormick,1976:305). But what of the 'Choice Theory' which says that talk of children's rights makes no sense because of their inability to release others from duties? Could there be a case for children's rights based on the idea of proxy waivers? He points out that the British legal system has the power to take children from parents who do not fulfil their duties of care for them.

But this is not an example of the state waiving the children's right to care, or releasing the parents from their duty, since the parents may in fact be punished for not carrying out their duty, and, anyway, in all cases it is the interests of the children that are in question, not the question whether the children can release their parents from their duties. A strong case can be made out for the state claiming rights for children in place of their parents, but the case for the state and others to waive the rights of children is more difficult to establish.

Indeed, it may be the case that children, like adults, have some inalienable or absolute rights which no one can waive for them (cf. the debate on the right to experiment on children in recent years, R.McCormick,1976; Ramsey,1976; Nicholson,1986). N. MacCormick concludes that 'powers of waiver or enforcement are essentially ancillary to, not constitutive of, rights..' (MacCormick,1976:314).

This theory appears to avoid many of the faults associated with Hart's theory. It seems less arbitrary in so far as it stresses the particular goods due to persons rather than an abstract freedom to accept or reject certain values. The Benefit theory can accept the existence of inalienable rights. It is more plausible

intuitively in its acceptance of the ordinary use of rights-language with regard to children and the mentally incapacitated.

On the other hand, the Benefit/Interest theory does have at least one disadvantage. This is in relation to the problem of moderating rights-claims on the part of all who stand to benefit from the fulfilment of a duty. The question is whether one person's duty to another also gives third parties some right, since they benefit, perhaps indirectly, from the performance of the duty. And then what of fourth and fifth parties who may benefit? (cf. Waldron,1984:9-10). All that one can do here is to take this problem into account in the normative sphere when one seeks to nominate the person or persons who are to be the beneficiaries of a particular duty. In the case of special moral rights possessed by means of contract, the beneficiaries, and thus the possessors of the right, should be named clearly so as to avoid undue expectations arising. In more informal arrangements between persons such distinctions may be more difficult to draw.

I do not wish to give the impression here that the Choice/Will theory is totally discredited. True enough it does not cover all types of rights, but merely the category called 'discretionary' or 'option' (cf. Feinberg,1980:232-238; Golding:1968:546), where there is a freedom to participate in a certain good or to refrain from such participation. However, it is sufficient that some rights are waivable and relinquishable to stress the importance of this theory which highlights the control that right-holders maintain over the duties of others. In fact, even in cases where rights are inalienable or absolute, the claim one has over the duty of another is essential to one's freedom. To waive one's right in that instance would be an abuse of freedom by choosing to do wrong.

1.6 Conclusion

Whatever about the possibility of a Christian normative ethics, there is no such thing as a Christian metaethics. The analysis of the language of morals is prior to the study of the relationship between faith and ethics (cf. Gerard Hughes who claims that problems of method in the study of morality 'are ultimately philosophical problems' and that this holds true for moral theology (1978:xv); there is also the point made by a number of philosophers, that obedience to God's will requires firstly an assumption that God is 'good', and one needs to understand 'goodness' before one recognises this quality in God, cf. Ewing,1961; Nielson,1973:ch.1). For instance, before anyone can discuss the possibility of God having 'rights', or His giving 'rights' to humanity, there is a need to discuss the meaning of 'rights' as such. This has been the purpose of this chapter.

At the general level of analysis I examined a number of mutually complementary and ultimately synonymous terms which bring out the basic meaning of 'right'. In particular I stressed the appropriateness of using terms like 'valid claim' and 'entitlement' to elucidate the meaning of rights-language. Rights give a justification to make demands on others with regard to certain goods required by the right-holder. The terms 'power' and 'liberty', used in a general sense, further illustrate the value of rights in protecting an individual's interests.

At the specialised, technical level of Hohfeldian analysis, elucidation of rights-language concentrated on the various kinds of normative relationship that exist when 'rights' are claimed. Some 'rights' are more powerful than others in the way that they impinge upon others. Sometimes, as in 'claim-rights', there are clear-cut correlative duties to cooperate with the right-

holder in achieving his interests, a cooperation which may imply positive help and/or non-interference. At other times, as in the case of 'liberty-rights', the correlative duties are extremely limited, but still offer some protection. The other types of right - 'powers' and 'immunities' - have to do with a capacity to change relationships with others or to maintain a present state of affairs in relation to others. The complexity of these varied normative relationships was pointed out, together with criticisms and alternative interpretations. The aim has been to clarify concepts, not to avoid controversy. In fact, the controversies discussed, especially regarding the correlativity of rights and duties, are a stern reminder that normative relationships of these types are untidy, yet firm.

The last section on theories of rights brings together much of the preceding material in synthesis. Rights do give a degree of control over the duties and obligations of others. In some cases this control involves a freedom to waive or relinquish rights, thus releasing another from a duty either temporarily or permanently. In other cases, the interest or benefit to the right-holder is of such importance that the control over correlative duties has to be firm, and itself becomes a duty on the part of the right-holder. Feinberg calls this coincidence of right and duty in the situation of the right-holder a 'mandatory right' (cf. Feinberg,1980:232-238). In other words, both 'Choice/Will theory and 'Benefit/Interest' theory contribute something important to the understanding of rights-language and the concepts this language expresses. Indeed, the interests of individuals are important in the analysis of rights, but this must not become the sole preoccupation of the analyst. This chapter has insisted that an equally important question is 'Granted that this interest is justified or valid, how does this involve others in relation to me and to this interest?'

Finally, the controversies raised in this chapter provide a bridge to the next chapter where I discuss some sceptical positions regarding rights-language. Put crudely, the question now has to be asked, 'Is all this fuss about rights really necessary, and could contemporary metaethics and normative ethics be simplified by abandoning rights-language completely?

Chapter 2

Conceptual Scepticism and Rights

2.1 Introduction

The last chapter introduced some of the philosophical and legal literature on the concept of rights and the use of rights-language. The idea there was to clarify and elucidate that concept and language, partly as a response to an initial kind of scepticism which would accuse rights-language of being incurably vague and indeterminate. The clarification and elucidation of rights-language is of importance in philosophy and in theology, given the regular use of this kind of language. Obviously if moral arguments are to hinge on the concept of rights, that concept must be clear and determinate.

In this present chapter, I continue to face up to arguments against the value of rights-language, in particular those arguments which hold that the concept of rights is 'logically redundant or epistemologically ungrounded or both' (Gewirth,1986:329). It seems to me that Christian ethicists have not paid much attention to this question, but have taken for granted the basic logical respectability of the rights concept. Obviously, if philosophy could establish that the use of this concept is logically redundant or epistemologically ungrounded, this would cause some embarrassment in moral theological circles. It is my task here to examine the arguments for conceptual scepticism in order to show how they fail, and in order to establish the logical and epistemological respectability of rights-language in general.

In the following pages I shall deal with these questions of scepticism mainly as they are presented in Alan Gewirth's article in Mind (1986), 'Why Rights are Indispensable?'. He deals with two kinds of scepticism in

this article - conceptual and moral - but I limit myself to the conceptual type in this chapter.

2.2 The Correlativity Objection

The doctrine of the correlativity of rights and duties was discussed at some length in the last chapter (cf.1.4,A), but how does this doctrine lead to conceptual scepticism about rights in general? Gewirth shows how the correlativity objection runs. If right and duty are simply different names for the same normative relationship, depending on the point of view from which it is regarded, then surely one of them is redundant? If the language of rights adds nothing extra in the way of content to the language of duty and obligation, then, arguably, the language of obligation and duty should be preferred to the language of rights (Gewirth,1986:330; Arnold,1978:82ff).

In reply to this objection, Gewirth argues thus:

> ...even though claim-rights and strict duties are correlative, this does not mean they are identical. Instead, they have different normative contents and a different valuational status, in the following way. Rights are to duties as benefits are to burdens (1986:333).

Note here how Gewirth adopts a position close to that held by Feinberg and by Benefit or Interest theorists. For Gewirth, rights are 'justified claims to certain benefits' (ibid.,333). A duty, on the other hand, is a justified burden, restricting the freedom of the duty-bearer 'in ways that directly benefit not himself but the right-holder' (ibid.). In this way Gewirth's position is similar to that of Neil MacCormick as well, for MacCormick has argued that, at least in certain cases of legal rights, rights are prior to duties. In his article on children's rights already cited, MacCormick refers to the Succession

Act (1964) in Scot's law, where children have a right to parental property if a parent dies intestate. This right is possessed even before the executor is named who will bear the correlative duty (MacCormick,1976:312). According to Gewirth, rights are prior to duties 'in the order of justifying purpose or final causality, in that respondents have correlative duties <u>because</u> subjects have certain rights.' (op. cit.,333). Rights-language is not redundant, then, because rights are the 'justifying basis' of duties.

Ronald Dworkin appears to support the main point of the non-reduncancy of rights-language in his famous distinction between 'right-based', 'duty-based', and 'goal-based' moral theories (Dworkin,1978:150-183). Dworkin adopts a view close to that held by Braybrooke, discussed above, that the correlativity thesis is untidy but firm:

> In many cases, however, corresponding rights and duties are not correlative, but one is derivative from the other, and it makes a difference which is derivative from which. There is a difference between the idea that you have a duty not to lie to me because I have a right not to be lied to, and the idea that I have a right that you not lie to me because you have a duty not to tell lies. In the first case I justify a duty by calling attention to a right; if I intend any further justification it is the right that I must justify, and I cannot do so by calling attention to the duty. In the second case it is the other way around (Dworkin,1978:171).

Dworkin's stress on derivation rather than correlativity does not undermine his general position of 'taking rights seriously', for at least some rights would appear to be prior to duties in his approach. His first aim, of course, is to oppose both right and duty-based theories of morality to goal-based theories, the latter being exemplified in Utilitarianism. 'Rights are best understood as trumps over some background justification for political decisions that states a goal for the commun-

ity as a whole.' (Dworkin,1984:153). (There is some controversy as to whether utilitarians must be hostile to the language of rights. Some have been, e.g. Bentham,1843; Frey,1983, while others are positively disposed, e.g. Hare,1981:ch 9; Gray,1984.) However, given that right-based theories of morality protect individuals from utilitarian reasoning which might demand unjust sacrifices from them, Dworkin also distinguishes between right-based and duty-based theories. Although both theory types put the individual at the centre of attention, each treats the individual differently. Duty-based theories, e.g. kantian morality, are more concerned with the quality of acts reaching a certain standard (whatever the consequences). On the other hand, 'Right-based theories are, in contrast, concerned with the independence rather than the conformity of individual action. They presuppose and protect the value of individual thought and choice.' (Dworkin, 1978: 172).

If Dworkin is correct in his analysis of rights-language, not all rights can be reduced to the language of duty, since some duties are derivative from rights, and, secondly, because the language of rights forms a theory-type which stresses the important moral value of individuality. Here again the relationship between metaethics and normative ethics is seen clearly. The language of morals is found first in everyday talk concerning moral issues, and the analysis of this language must take into account what people think is important in the moral life. Thus, if people are worried that communal advantage will swamp the legitimate interests of individuals, such an anxiety may well come to be situated in moral theory in the language and concept of rights.

A further defence of the language of rights against reduction to the language of duty is found in another argument presented by David Braybrooke in his article on the 'firm but untidy correlation..'. In response to

Lyons's position he makes this important point:

> There is an interpretation of Lyons which makes the entailment between rights and obligations logically superfluous, because a set of clear obligations exist anyway. But logical superfluity does not imply practical superfluity. People, for instance, might first learn about their obligations from being educated about rights. The connection might be kept for fear of unforeseen lapses in following obligations (Braybrooke,1972:357).

This 'pedagogical' argument for maintaining the language of rights is partly a metaethical argument and partly a normative one. From the normative point of view, the interest is in getting people to respect rights in the most effective way. And one way may be as Braybrooke suggests, to look at obligations from the angle of rights, rather than looking at obligations on their own separate from the claims of others. But, learning to look at the normative relationships between people involves a metaethical aspect, some 'concept' of the different angles one can look at what binds people together morally, namely, rights and duties.

Finally, I can mention once again the key element in the 'Choice' or 'Will' Theories of rights - the control one has over the duty of another. Sometimes this control implies a firm claim against others to act or refrain from acting; sometimes control means the capacity and freedom to waive or to relinquish one's right, with the corresponding release of another from his or her duty. Now, it seems to me, that any reduction of rights-language to the correlative language of duty will miss out on this important function of control over duty. One might argue that in the place of waiving rights one could create a hierarchy of duties, with accompanying rules telling one when a duty no longer applies; but all this does is to transfer the power of waiver to the persons who frame the particular rules. It is furthermore doubtful whether an agreed hierarchy of duties and obligations could be con-

structed. And, finally, the faculty of waiving is such a personal one, taking in the area of supererogation for instance, that general rules for bypassing certain obligations or duties would be relatively unhelpful, if not totally useless.

2.3 The Interests Objection

The Interest/Benefit theory of rights holds that the essence of rights lies in nominating the beneficiaries of certain duties, in order to protect their interests or assure their benefit in a special area. The objection now is that human agents can easily recognise the importance of respecting interests without having to mention having rights to them. In this way, rights are only so much 'excess baggage'.

R.Frey, a philosopher from Liverpool University, has insisted on this point, arguing against the value of rights-language from a utilitarian perspective. He asks:

> What is wrong with torturing or killing someone is not the violation of some right of his, but the sheer agony and suffering he undergoes, the snuffing out of his hopes, desires and wishes, and so on...In short, there is no need to postulate moral rights as intermediaries between pain and agony, or twarted hopes, desires, and plans, or ruined lives and the wrongness of what was done (Frey,1983:49).

Gewirth's response to this objection sems remarkably weak. He just says that rights add something indispensable to the situation, that is, a moral justification for the protection of an interest. Then he says, rather lamely in my opinion, that one could have an interest in murdering someone and even be protected in furthering this by unscrupulous friends, but this would not amount to a moral right (op. cit.,334). However, I am sure that Frey is not thinking of making just any 'interests' morally

right simply by adding some protection to the agent. Frey, as a utilitarian, can argue that his moral theory is perfectly well-suited to distinguish morally between interests.

Frey's argument then, to have any chance of success, must begin with interests that are moral. There are, after all, natural disasters which cause agony and suffering, snuff out hopes and desires, and so on, but the ways in which such events touch personal interests is not in question here. What is in question is human action which affects the interests of others; and Frey's argument assumes the basic moral position that persons ought not to cause others suffering, other things being equal, or without clear justification. Surely anyone can see this, is Frey's reaction, and there is no need to complicate matters by introducing rights as 'intermediaries'. In some cases no doubt people do what is right and avoid what is wrong without considering the 'rights' of others; there can be an intuitive reaching out to the victims of suffering without much, if any, conceptualisation of right and wrong, or of rights and duties. But this does not mean that nothing further can be learned about the moral realities of such situations, and that rights are redundant from the explanatory point of view.

The basic problem, I think, with Frey's reductionist approach is that he assumes too quickly a normative connection between the interests of persons and the activity of others in fulfilling these interests. Granted that another person is suffering in some way, the question remains 'What is this to do with me?'. Many people suffer in this world, but I cannot help everyone. In many cases I have an obligation to help those with whom I have a special relationship, e.g. family and friends, and this leaves me comparatively little time and resources to help others down the road, and even further afield. How do I distinguish morally between various suffering people?

Surely one answer is that I should consider the rights of others. And it usually turns out that certain people have more of a 'claim' on me than others. Moreover, if I fail to recognise the justified claims of those closest to me, I may well cause a specific form of suffering - betrayal - because of the special expectations that arise from 'special moral rights'. So it appears that rights often do help in directing agents towards the relief of human suffering, and they explain some of the further intensity of suffering caused when those with most claim on others are ignored or betrayed. (Again, Melden's ideas are important here, as he states that, 'For the possessor of the right orders and conducts some portion of his life in such a way that a failure on the part of the person obliged to him is not merely to disappoint him or visit some misfortune upon him, but to wrong him, i.e. to commit an offence against him as a moral agent.'(Melden,1977:53).

It is good here to reiterate one of the main points of my thesis, namely, that rights-language concentrates not merely on interests and benefits of persons in isolation, but on the 'claims against' and 'powers over' others which these interests and benefits provide.

I shall conclude this section with a quotation from Charles Fried (1978), who takes up a position on rights and interests similar to Dworkin's emphasis on rights as trumps over utilitarian attempts to maximise values or interests. I hope that these words will be self-explanatory, and a partial summary of what has preceded in this section.

> Yet it is the case that rights are <u>also</u> interests, or at least they protect or express interests. Indeed, in consequentialist analyses rights appear only as interests, more specifically as those interests which in a particular or general striking of the balance have ended up as carrying the day over competing interests. In the system I propose, rights have a prior status. When a person asserts a right he is doing more than announcing an interest to be taken

> into account. After all, every interest must at least be taken into account. And since an interest is a potential pleasure or pain, the utilitarian must always consider it, just as a businessman must consider any potential revenue or cost. The assertion of a right is categorical. Thus a right is not the same as an interest, though there is an interest behind every right (Fried,1978:85).

2.4 The Justificatory Objection

Joel Feinberg situates the grounds of rights in certain rules or principles. He states that:

> A man has a legal right when the official recognition of his claim (as valid) is called for by the governing rules. This definition, of course, hardly applies to moral rights, but that is not because the genus of which moral rights are a species is something other than claims . A man has a moral right when he has a claim the recognition of which is called for - not (necessarily) by legal rules - but by moral principles, or the principles of an enlightened conscience (Feinberg,1970:154).

Robert Young (1978) takes up these ways of grounding rights and highlights the complexities underlying such seemingly innocuous remarks, with particular reference to moral rights (legal rights being relatively determinate in contrast to moral rights). The main issue here, according to Young, is the pluralism of moral principles and the difficulty of finding widespread agreement on moral matters. It appears that the foundation of rights will be rather unsound, especially if one does not hold the existence of objectively correct moral principles (Young,1978:66). Given such a moral epistemology, one has to adopt a conventionalist understanding of moral rights, as established by community consensus. This will make the whole question of universal human rights a difficult one to settle in practice.

Raymond Frey likewise holds that the pluralism of moral principles undermines the theory of the value of rights:

> 'If moral rights are put forward on the basis of unagreed moral principles, we will not agree on whether there are such rights, whereas if they are put forward on the basis of agreed moral principles, they appear unnecessary, since our principles will already be leading us to behave in what the rights' proponents see as the desired way.' (op.cit.,51).

I shall answer the objection that rights can be reduced to moral principles in the next section; here I must answer the objection that rights are redundant precisely because principles are so varied and conflicting.

The first point must be rather obvious: the existence of rights does not depend on their being recognised by everyone, though their exercise requires widespread recognition, especially in the case of human rights. Arguably, some special moral rights may be exercised so long as a small group of people (sometimes just one other person) recognises the normative bond. One might deny the existence of objective moral values just as one might deny the existence of God, but this denial would not necessarily do away with either rights or the Deity.

Secondly, it may be argued that moral pluralism regarding rights has been grossly exaggerated by thinkers like Young and Frey. One can point to the existence of the United Nations Declaration of Human Rights, as well as other international agreements, as a sign of a general degree of basic agreement on fundamental interests which can be claimed in international law (cf.MacBride,1980; O'Boyle,1980; Cranston,1962:chs.3&4).

Sean MacBride, for instance, has argued that the U.N. Declaration' was not when it was adopted, a binding legal document, but it has now acquired the status of being enforceable as part of international customary law.' (MacBride,1980:11). Such an agreement is rather surprising in view of the different ideologies expressed by the world's different governmental systems. Where

there are conflicts of interests, some rights are subordinated to others, but often such subordination is either hidden for reasons of embarrassment, or justified in terms of other rights. In this way, most states reveal a degree of unanimity regarding the value of rights, in spite of the different interpretations of these rights in practice.

Thirdly, I do not agree with these attempts to load all the blame for present-day moral pluralism and indeterminacy on the shoulders of the concept of rights. It seems as if rights-language is being made a scape-goat bearing moral indeterminacy out into the desert. Unfortunately for the sceptics, this use of language and the concept underlying it has a tendency to wander back to haunt them. In my opinion, rights-language is not indeterminate in itself, it simply reflects the indeterminacy of the many competing moral theories in vogue today. In this way, rights-language seems no worse off than any other part of moral language, for instance, the language of duty or the language of rules or the language of virtue. None of these hangs in the air untouched by moral pluralism, so why single out moral rights as the main culprit? Granted that some of the claims made to various personal interests have been immoderate, this provides an argument only for moderation, not for the redundancy of rights-language. If the sceptics are to be consistent in their analysis of moral language in relation to pluralism, they should be equally despairing of the language of duty and obligation.

Therefore, I am not convinced that moral pluralism undermines the foundations of rights-language, though I recognise that concern must be voiced over moral pluralism's effect on the exercise of many rights.

2.5 Rights and Moral Principles

In the following sections I move away from the treatment of conceptual scepticism about rights as treated by Gewirth, and begin to treat of further types of conceptual scepticism. The justificatory objection spoke of the importance placed on moral principles as the grounds of moral rights, and then tried to weaken reliance on rights-language by pointing out the degree of moral pluralism with regard to those principles. A further step might be to simplify matters by returning to the principles themselves, using them as a substitute for talk of rights.

Before any attempt is made to make rights-language redundant in favour of moral principles, it should be noted how the philosophical treatment of moral principles is not without controversy. For instance, there is the question of the distinction between moral principles and moral rules. Regarding this distinction, Marcus Singer (1958) declares that,

> It has generally been recognised that there is a distinction of some importance between moral rules and moral principles. Yet the distinction has not generally received explicit formulation, and there is no general agreement on just what it is (Singer,1958:160).

So, straightaway there is the problem of whether the reduction of rights is going to be in favour of principles, or rules, or some combination of these. Singer favours the view that moral principles are more general than moral rules, though not so general that they lose their action-guiding force. Principles have a role, for instance, in limiting the content of moral rules. Thus, an example of a moral principle would be the 'Generalization Argument' or principle of justice/ impartiality. This states that 'What is right for one person must be right for any similar person in similar

circumstances.' (ibid.,164). Such a principle, according to Singer, is exceptionless. Also it sets limits to any moral rule if it is to lay claim to being a 'moral' rule. Moral rules, on the other hand, are specific, e.g. 'Stealing is wrong', 'Everyone ought to keep their promises'. Such rules are specifically action-guiding, but they are so specific that they must allow for exceptions, according to Singer. However, there is a general principle which states that exceptions to rules must be justified. This is a further example of a principle guiding the content of rules.

More recently, the American philosopher, Daniel Maguire (1978), has reacted to this distinction between principles and rules, arguing that in practice these terms are interchangeable. Thus, what is often called the 'Golden Rule' could just as easily be called the 'Golden Principle' because of its generality. Or take the example of the so-called 'Principle of Double Effect', which might well be called 'a set of rules for situations where an action brings forth good and bad effects'. Maguire comes to the conclusion that 'The effort to render ethics unnecessarily tedious by distinctions that do not hold up in usage is both pedantic and unkind.'(Maguire,1978: 258, note 45).

Whatever the merits of these different approaches to principles and rules, it appears that all of the authors who discuss these terms agree on their action-guiding nature or function. A person interested in being morally good cannot afford to ignore moral principles or moral rules, either at the general or at the specific level. Thus, it seems to me, that the language of moral principles and moral rules is very close to the language of duty and obligation. One is not meant merely to consult principles and rules, but to follow and obey their direction. Thus, the advice to reduce rights-language to the language of moral principles brings one back to the

correlativity objection, which insisted on the priority of duties over rights. And, it follows that the response made to that objection will apply again here.

In addition, some further arguments can be made for the retention of the language of rights, showing that the language of principle performs different functions in moral argument from the language of rights. Thus, for instance, Jeremy Waldron, argues that the language of moral principles and moral rules refers moral agents to the right thing to do, what they ought to do. The language of rights, on the other hand, does not always refer to the right or obligatory action, but often enough to actions which are merely permissible. Such permissible actions have already been covered under the category of 'discretionary rights'. So, my right to do X does not entail that there is always a moral principle or rule commanding me to do X, though it usually implies such principles or rules on the part of others who have the correlative duty to protect my freedom in this area. In fact, in some cases persons have a 'right to do wrong' against others. There may be a principle or rule forbidding a certain action, but others have no freedom to impose the principle or rule on others. The common example here is in the sphere of 'personal morality', of what 'consenting adults do in private'. Here, persons may act wrongly, but still have a right to non-interference in the matter. Non-interference is often a correlative duty because interference might cause a greater wrong than the wrong performed by the right-holder (cf.Waldron,1981:21-39; Galston,1983:320-327).

Another argument which distinguishes principles/rules from rights is that only the former give reasons to act on every occasion. Having a right does not always give one a reason to act. An obvious example is the ordinary right to marry; having this right against others does not force me to prove its existence by trying to marry. Rights,

then, do not necessarily justify moral actions on the part of right-holders, though usually there is the assumption behind valid claims that the interests sought are good, and the actions posited are right ones. (Thus, even in the case of the 'right to do wrong', right-holders either believe that they are acting rightly, though in fact their conscience is erroneous, or they are acting in bad faith but conceal this from others, pretending that they are following conscience.) There is, however, a strong connection between rights and reasons for acting, insofar as valid claims or entitlements presuppose reasons for duty-bearers to respect the interests of right-holders. Sometimes, too, right-holders have duties to claim their rights and are obliged not to waive or alienate rights. These 'mandatory rights' have been mentioned already; they are a perfect coincidence of right and duty in the life of the same person, but one should note that it is the aspect of duty here that gives the reason to act, not so much the aspect of right.

It is important for a proper understanding of rights that the correct relationship between rights and justified action be noted. I have already stated that rights do not necessarily justify the action of the right-holder, though they do usually justify the actions of duty-bearers. However, in talking of the action of the right-holder a further distinction must be made, between an agent pursuing a particular interest and an agent claiming either the help or the non-interference of others. Having a right does not necessarily justify the former, but it necessarily justifies the latter, since the connection between having a right and claiming against others is analytic or conceptual.

To illustrate this distinction, consider the basic right to take up lawful employment. Suppose I have an offer of a job and someone asks 'Are you justified seeking employment in that position?', the reply, 'I have

a right to take on this job', is not the proper answer. That reply - 'I have a right to take on this job'- is rather the appropriate answer to the question 'Why do you expect me to help you to get this job?', assuming that the right-holder is looking for positive help, e.g. a reference, or negative help, e.g. an assurance from another that he or she will not compete for the same position. The 'right' to take on a particular job is not necessarily a justification of the agent's decision to do just that, rather it concentrates on the control one has over the activity or forbearance of others. There is much sense, then, in the following words from Glanville Willams:

> No one ever has a right to do something; he only has a right that some one else shall do (or refrain from doing) something. In other words, every right in the strict sense relates to the conduct of another, while a liberty and a power relate to the conduct of the holder of the liberty or power (Williams,1956:1145).

It is probably a bit extreme to say that 'No one ever has a right to do something'. I think there is justification in using this form of speech in ordinary affairs, so long as its usage is accompanied by the proper interpretation, i.e. that rights turn on what I can expect others to do for me, legally and/or morally, regarding what I wish to do or not to do.

Finally, in my attempt to show that the language of rights should not be replaced by the language of principles, I cite the interesting article by Stephen Toulmin, 'The Tyranny of Principles' (Toulmin,1981:31-39). Toulmin is worried about 'the revival of a tyrannical absolutism in recent discussions about social and personal ethics.' (1981:31). For instance, in the debate on abortion, 'much of the public debate increasingly came to turn on "matters of principle." As a result, the abortion debate became less temperate, less discriminating, and

above all less resolvable.' (ibid.,32). A further example given by Toulmin of the growing reliance on rules and principles is worth quoting at length:

> My perplexities about the force and value of "rules" and "principles" were further sharpened as the result of a television news program about a handicapped young woman who had difficulties with the local Social Security office. Her Social Security payments were not sufficient to cover her rent and food, so she started an answering service, which she operated through the telephone at her bedside. The income from this service -though itself less than a living wage - made all the difference to her. When the local Social Security office heard about this extra income, however, they reduced her benefits accordingly: in addition, they ordered her to repay some of the money she had been receiving. (Apparently, they regarded her as a case of "welfare fraud.") The television reporter added two final statements. Since the report had been filmed, he told us, the young woman, in despair, had taken her own life. To this he added his personal comment that "there should be a rule to prevent this kind of thing from happening.
>
> Notice that the reporter did not say, "The local office should be given discretion to waive, or at least bend, the existing rules in hard cases."What he said was, "There should be an additional rule to prevent such inequities in the future." Justice, he evidently believed, can be ensured only by establishing an adequate system of rules, and injustice can be prevented only by adding more rules (Toulmin.1981:32).

Toulmin goes on to explain how humanity has come to this emphasis on rules. Looking at Roman law, he remarks that rules were not explicitly used in the Roman legal system for the first three centuries of its history. This was due to the small and relatively homogeneous character of daily life. Legal conflicts were solved by the 'College of Pontiffs', a set of judges who adjudicated cases set before them. They did not have to give reasons for their judgements, since the citizens trusted their judgement and allowed them wide discretion in judgement. This changed when Rome grew into an empire; the case-load increased and had to be adjudicated by junior judges.

These judges had to be trained in the practice of the law, and this involved passing on rules to deal with different situations. Less discretion was allowed, as Toulmin mentions, 'Discretion, which had rested earlier on the personal characters of the pontiffs themselves and which is not easy to teach, began to be displaced by formal rules and more teachable argumentative skills.' (ibid.,33).

In general, Toulmin argues that the reign of rules and principles reflects the growth of the 'Ethics of Strangers'. As communication, especially travel, developed, people who were used to dealing morally with others in the personal and intimate way of small communities, now had to deal morally with groups of people who were unknown to them - strangers. Tolstoy's notion of morality is cited by Toulmin as an example of a system that has largely passed away, and which needs to be revived in some ways.

> As he saw matters, genuinely "moral" relations can exist only between people who live, work, and associate together: inside a family, between intimates and associates, within a neighbourhood. The natural limit to any person's moral universe, for Tolstoy, is the distance he or she can walk, or at most ride. By taking the train, a moral agent leaves the sphere of truly moral actions for a world of strangers,...(ibid.,34).

Once one begins to deal morally with strangers, an element of distrust enters, and the role of strict rules and principles is supposed to give some confidence in dealings with people. Furthermore, since those who run the legal system are also strangers, they must be controlled by strict rules as well. One cannot afford to allow them too much discretion.

Toulmin's warnings about the tyranny of rules and principles are basically a call for a return to the value

of equity, which requires an important element of discretion in the legal and moral system. Treating the moral world as a world of strangers only gives rise to a morality of rules stressing equality, but this complex world of different personalities with different needs demands equity to temper the rigidity of equality. In the ethics of intimacy, of the 'friendly society', individual needs and differences are taken into account, and this model should be restored so far as it possible.

Toulmin does not mention the role of rights in his article, so I am not sure what he would have to say about their role in morality. Some may argue that they too are an expression of the 'ethics of strangers'. But my arguments have stressed the fact that rights-language is more flexible than is sometimes thought, and certainly more flexible than the strict language of principles, rules, obligations and duties. The fact that at least some rights are 'discretionary' and that rights can be waived or relinquished in some cases is indicative of the flexibility of this kind of moral and legal language. On the other hand, rights can also participate in the categorical nature of rules and principles, especially when vitally important values are at stake - hence the usefulness of notions like 'inalienable', 'absolute' and 'mandatory', rights.

2.6 Scepticism and 'Human Rights'

Scepticism concerning rights usually concentrates on moral rights rather than on legal rights. Frequently when people think of moral rights they identify these with the category of 'Human Rights'. However, there is a mistake here, since not all the rights of human persons are 'human rights'. If I promise to meet a friend at the cinema this evening, I give him a right to expect me to keep my promise, but this right is not a 'human right' in the

strict sense.

The main characteristics of a human right are given by Richard Wasserstrom as follows:

> First, it must be possessed by all human beings, as well as only by human beings. Second, because it is the same right that all human beings possess, it must be possessed equally by all human beings. Third, because human rights are possessed by all human beings, we can rule out as possible candidates any of those rights which one might have in virtue of occupying any particular status or relationship, such as that of parent, president or promisee. And fourth, if there are any human rights, they have the additional characteristic of being assertable, in a manner of speaking, "against the whole world." (Wasserstrom,1964:12).

Clearly, the third characteristic mentioned above eliminates my example of promising to meet a friend from the sphere of human rights. Human rights are universal in the sense of being possessed by all in virtue of their common humanity. However, nearly all the characteristics mentioned by Wasserstrom are controversial, and some of the arguments against human rights may engender scepticism about the many claims made in their name. Indeed, some may feel that the category should be eliminated totally. Let me mention some of the problems faced by this category of 'human rights'.

Kai Nielson has criticised the concept of human rights as epistemologically ungrounded (Nielson,1968). The concept, he argues, depends on certain built-in normative assumptions that have not been proved, assumptions mainly to do with equality between humans. If the moral point of view is characterised in terms of prescriptivity and universalizability, then Nietzsche's 'Slave Morality' qualifies as a moral system. There are some superior individuals in the human race, and rights and duties apply to them in the full sense. The Ubermenschen need not recognise the rights of weaker men and women because they

are not equal. According to Nielson, then, one begs the question of the moral point of view by building-in equality and then assuming that everyone is in fact equal. It is quite obvious to everyone that in many areas of life human beings are unequal, so the equality spoken of by human rights theorists must be of a 'special' kind. Usually this involves statements about 'intrinsic worth', but this type of language is rather hard to pin down. According to Nielson, it appears to be related to some dubious metaphysical and theological doctrines (ibid.,578).

If 'intrinsic worth' is related to some distinctive endowment of human beings, e.g. their rationality or their ability to value interpersonal relationships, then there will be some 'humans' whose 'intrinsic worth' will be in question. There may then be severely mentally handicapped people who cannot be accorded 'human rights'. If 'intrinsic worth' simply means being a member of the human race in the sense of being born of human parents, then holders of such a position may be accused of 'speciesism' (cf.Ryder,1985:77-88). This charge criticises the arbitrariness of respecting the human species by according it special rights as against other species. Why should not gorillas be given special rights because they are born of gorilla parents?

Personally, I think that Nielson has made some important points in his criticism of the concept of 'human rights'. Ultimately, I feel that the notion of 'intrinsic worth' can only be understood in metaphysical or theological terms and I shall discuss this in greater detail in chapter 4. However, I am not sceptical, as Nielson is, about the possibility and value of either metaphysics or theology. Moreover, I believe that Nielson's point about having to build in equality into the concept of human rights is well taken. The concept of universal human rights involves an ultimate evaluative

position concerning humanity. The concept is not a logical discovery which binds everyone by fear of contradiction if one were to deny it, it is a moral discovery which grounds one's normative ethics. And from here it passes into metaethics. When one refers to the basic equality of human beings as requiring special respect to be shown for all, one is not saying that all humans are equal in their talents and in their actual participation in earthly goods. One is saying that at the deepest level all human persons have equal worth, a worth which demands action to bring the less fortunate of the species up to a satisfactory level of participation in the goods which make human worth obvious to the naked eye. It remains open to people if they want to use this concept or not, just as it is open to people to accept or reject the notions of inalienable and absolute rights. One can understand the meaning of these concepts as one understands the concept of unicorns and ghosts, yet deny the actual existence of these realities.

A further problem with the concept of human rights arises once again in the area of correlativity, this time in relation to the scope of the right. Human rights are said to be universal rights, possessed by everyone and against everyone. But this is not agreed upon by everyone. Earlier in this essay, I cited the work of McCloskey on the notion of rights as 'entitlements'(cf.1.2,B). Remember his argument that the right to life (a typical human right in most normative systems) can hardly be seen as a list of claims against every single person in the world. After all, I am not likely to be in touch with a large proportion of the world's population during my life-time, so why should I be in need of some normative relationship regarding such strangers?

One solution to this problem of human rights implies that universal human rights are possessed by all, but not against all. Instead they are rights of citizens against

their state. This is how Carl Wellman (1978) expresses the point:

> Traditionally, human rights have been thought of as those ethical rights that every human being must possess simply because he or she is human. Thus, human rights are the rights any individual possesses as a human being. Although this seems to capture current usage pretty well, I propose a more narrow conception of human rights. I define a human right as an ethical right of the individual as a human being vis-a-vis the state. Excluded by this definition are the ethical rights one has as a human being that hold against other individuals or against organizations other than the state (op.cit.,55-56).

Wellman explains the reasons why he wishes to narrow the concept of human rights. Firstly, the tradition of natural rights and the major declarations of the rights of man tend to have as their 'primary and definitive purpose' the proclamation of the rights of individuals 'in face of' the state. Secondly, there must be a difference between the relationship holding between the individual and the state and that which holds between the individual and other individuals and organisations, 'just because the state is a special sort of organisation with a distinctive role to play in human affairs.' (ibid.56).

There is much to be said for narrowing the concept of human rights in line with Wellman's thesis, especially when the concern is with exercising rights in a positive way. Because of the state's power and resources, individuals more readily look to the state for positive help and for non-interference than to other individuals. The state's control over health services and social services in general are cases in point. But, at the same time, I am reluctant to eliminate the wider notion of human rights as being held, at least in some circumstances, against everybody. Of course the positive aspect of this is not of first importance. I cannot expect perfect strangers to help me in many cases where I

am pursuing some project. But the negative aspect of human rights is important, insofar as it gives a general sense of confidence that a wide circle of individuals recognise my need not to be disturbed, if only implicitly. Thus, D.D.Raphael (1965:216) makes a useful distinction between human rights in the 'strong' sense and human rights in the 'weak' sense. The 'strong' sense refers to rights held against everyone; while the 'weak' sense' corresponds to Wellman's narrowing of the concept to social or civil rights. I feel that both senses have some validity in moral and legal discourse.

Finally, regarding the difficulties with the concept of 'human rights', there is the connection between these rights and the traditional 'natural rights'. The modern term 'human right' tends to hide some of the essentialist assumptions included in the concept of 'natural right'. Is there some common 'nature' which all humans possess and which acts as a basis for deriving fundamental rights? Or are human rights to be understood in a more conventionalist sense, with reference to generally accepted values, but without metaphysical assumptions?

In a seminal article on the subject of 'Natural Rights', Margaret Macdonald (1947) argues that natural rights are in the category of values rather than facts, and as values they are a matter of decision or choice, not a matter of discovery. In the light of this non-cognitivist approach to morality, she goes on to say:

> In short, 'natural rights' are the condition of a good society. But what those conditions are is not given by nature or mystically bound up with the essence of man and his inevitable goal, but is determined by human decisions (Macdonald,1947:34).

Inevitably, then, Macdonald is a critic of the view that there is a fixed human nature from which can be derived 'natural' or 'human' rights. She calls the

attempt to do so 'the Aristotelian dream of fixed natures pursuing common ends', and she lampoons a modern version of this in the work of J. Maritain, where he uses the analogy of different pianos, all geared towards the production of attuned sounds (ibid.,29; Maritain,1942;140-141). According to Macdonald, 'Men do not share a fixed nature, nor, therefore, are there any ends which they must necessarily pursue in the fulfilment of such nature.' (op.cit.,30).

One can sympathise with Macdonald only, I think, because her position is so extreme. Of course it sounds ridiculous to compare human persons to pianos, and to speak of fixed natures in that sense. It is also dangerous to try to deduce in detail rights, rules and principles from human nature. But I cannot see how one can escape from some notion of a human nature that is fixed and also normative in some way. How can one talk of human beings unless there is some set of characteristics that distinguishes the species from other species of animal? Not that all human characteristics divide men and women from the rest of nature in an absolute way. Clearly there are points of contact, especially between human needs and those of animals; but there is also a sense in which being human imprints something special regarding the experience of those needs, so that they become conscious values to be promoted. Obviously, human attitudes towards procreation present a good example of a distinctively 'human' experience of a common animal need. In the second part of my thesis I shall be drawing out the implications of the specifically human and Christian appropriation of procreation (cf.chapter 5).

In recent times, the category of the 'personal' appears to have come to the fore in much 'natural law' thinking, such that the older idea of 'fixed nature' has moved into the background. This may be a good thing, since it is important to recognise the individual ways in which human

nature is experienced. Thus, human rights must take into account the variety included in individual experience of personal nature. However, this makes respect for human rights more complicated.

2.7 Conclusion

This chapter has taken up some of the controversial points surrounding the analysis of rights-language which were studied in the first chapter, and has added to these points in order to make clear the case for conceptual scepticism with which one can confront this form of moral language. The underlying question here has been, 'Given the difficulties of analysing rights and the language of rights, is it truly worthwhile to maintain the usage of the concept and the language?'.

In general the conceptual objections presented in this chapter have been part of a reductionist enterprise regarding rights-language. I have given a number of reasons why this form of moral language should not be abandoned. For instance, rights often appear to be prior to duties in the sense that duties are for the sake of rights as burdens are for the sake of benefits. Then there is the advantage of flexibility in moral language based on the possibility of waiving rights or relinquishing them voluntarily. The distinction between 'discretionary' rights and 'mandatory' rights in particular, reveals how the language of rights can be strict at certain times and flexible at other times. It was argued that even if it were the case that rights were logically superfluous, there would still be a pragmatic argument for retaining them, for instance, for pedagogical purposes, in order to remind people of their duties. Sometimes moral positions become clear by looking at normative relationships from different angles.

I argued that rights cannot be replaced by talk of interests, because the language of rights deals with the fundamental question of how the interests of others bind persons in normative relationships. Again the essential point is that rights are relational realities, and they help to discriminate between different moral and legal relationships. Regarding the justification of rights and the unavoidable moral pluralism of modern society, I argued that moral pluralism should not be exaggerated, and that there was at least a general agreement on the value of the language of human rights. No state wants to have the name of being a human-rights violator, even if violation of rights is performed in secret in so many places. In any case, the argument for moral pluralism seems to apply equally to the use of other moral concepts, whether it be duty or obligation, or rules or principles. The concept of 'right' should not be made into a scapegoat in this way.

On the subject of the possible reduction of rights-language to the language of rules and principles, I tried to show first of all that the relationship between rules and principles is not very clear. Then I argued that rules and principles are directly connected with 'right action', which is not the same concept as 'having a right to do something'. If an action is the right thing to do then I have a moral reason for doing it, and, other things being equal, I ought to do it. But 'having a right to do X' does not necessarily give me, the right-holder, a reason to do X, as in the case of the right to marry. Rights thus protect freedom in general, whereas rules and principles seem to function in directing human freedom along particular lines. Since moral principles and moral rules do not perform the same function as the language of moral rights, it seems unlikely that the former can take the place of the latter without remainder.

As a parting shot, I introduced the views of Toulmin,

who associates the language of moral principles and rules with the 'ethics of strangers'. This form of language tends towards absolutism, lack of trust in others, unwillingness to allow discretion and equity. The language of rights, I think, can allow readily enough for the flexibility required in an 'ethics of intimacy' as well as helping men and women to cope in a world of strangers.

Finally, I treated of some of the difficulties connected with the language of 'human rights'. Again the problem of correlativity between rights and duties came to the fore, and I had to distinguish between 'strong' and 'weak' senses of human rights. I accepted that certain moral assumptions of an ultimate kind, e.g. equality of intrinsic worth, should be built into the concept of a human right, and that no one is logically compelled to do this. And I argued that the concept of a fixed human nature is a necessary element in the analysis of human rights, all the while qualifying this by underlining the variety of individual participations in the common human nature. This qualification is a warning against a derivation of a rigid set of rights from a fixed human nature. Such a rigid set of rights of the 'mandatory' kind would be little improvement on the language of principles, rules, duties and obligations.

In his book, Ethics and the Limits of Philosophy (1985), Bernard Williams puts the question:

> If there is such a thing as the truth about the subject matter of ethics - the truth, we might say about the ethical - why is there any expectation that it should be simple? In particular, why should it be conceptually simple, using only one or two ethical concepts, such as duty or good state of affairs , rather than many? Perhaps we need as many concepts to describe it as we find we need, and no fewer (Williams,1985:17).

This is precisely the question I have been attempting to answer in this chapter.

Chapter 3

Moral and Theological Scepticism

3.1 Introduction

Having defended the language of rights in the face of conceptual objections which question the value of the underlying concept, I now turn to another form of attack on the language of rights, a two-pronged attack from the point of view of normative moral theory in both secular ethics and Christian ethics. There is a certain overlap between these objections, since Christian ethicists and theologians have tended to echo some of the normative moral objections of secular moralists and moral philosophers. And I also deal with more radical moral theological objections which have some connection with mainstream moral philosophy.

I begin, then, with some rather obvious arguments why the language of moral rights is said to be not really morally respectable. Firstly, the language of rights tends towards individualism and egoism, and tends to play down social solidarity and the common good. Secondly, the exercise of rights, especially the use of the faculty of 'claiming', is a sign of a growing adversarial trend in modern life which sets people at loggerheads, and does little for social harmony and peace.

From here I pass on to a more radical form of moral scepticism which has a clear theological reference as well as a secular moral one. I consider what may be called an 'anti-naturalist' position connected with the question 'Can a good man be harmed?' This position is radical indeed, insofar as it practically refuses to see much of ordinary human suffering, including what comes through injustice, as 'harmful' and as the object of rights. The only value of worth is the development and maintenance of

moral character; therefore, so much of the language of rights is merely a distraction from this one aim. From the theological point of view, this radically exposed situation is made possible by a kind of faith in one's 'absolute safety' in the hands of a greater power. In the light of such protection, much of the language of rights is distracting, concentrating as it does on forms of 'harm' that are hardly worth considering according to this point of view.

Since the last position may sound quite bizarre, I go on to discuss some religious positions which appear to share something of this single-mindedness and lack of care regarding the suffering which this world can throw up. Thus, I treat of the early Franciscan tradition and some pacifist stances. Such minority stances are strikingly attractive, but are often felt to be too utopian to be put into practice on a wide scale for any length of time. Furthermore, these stances often appear to be justified in terms of highly original callings discerned by special individuals. so that it is almost impossible to universalise their moral aspect.

I hope to show that the moral and theological objections fail and that the language of rights is respectable morally and theologically, once due care is taken with the use of this language.

3.2 The Egoistic Objection

Gewirth (1986) describes this objection as follows:

> Since a right involves a claim that a person makes for the support of his or her own interests, it evinces a preoccupation with fulfilment of one's own desires or needs regardless of broader social goals; hence it operates to submerge the values of community and to obscure or annul the responsibilities that one ought to have to other persons or to society at

> large. The insistence on one's rights may also, in certain circumstances, violate duties of generosity and charity, as when a land-owner evicts a needy family in the depths of winter for non-payment of rent (1986:332).

The egoistic objection is closely related to the charge of individualism which is often brought against the concept of rights, especially in view of the history of the development of the 'Rights of Man'. Note how this point is expressed by Eugene Kamenka (1977):

> The concept of human rights is a historical product which evolves in Europe, out of foundations in Christianity, Stoicism and Roman law with its ius gentium, but which gains force and direction only with the contractual and pluralist nature of European feudalism, church struggles and the rise of Protestantism and of cities. It sees society as an association of individuals, as founded - logically or historically - on a contract between them and it elevates the individual human person and his freedom and happiness to be the goal and end of all human association (Kamenka,1977:6).

Historically, perhaps the most radical example of individualism and egoism regarding the rights concept is associated with Hobbes and his notion of a 'Right of Nature'. In Leviathan (1651) he describes such a right as:

> the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgement, and reason, he shall conceive to be the aptest means thereunto... And because the [natural] condition of man... is a condition of war of every one against every one;... and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in such a condition, every man has a right to every thing; even to one another's body (Hobbes,1651:Ch.14;cf.Macpherson,1967:3).

The major problem with a 'right' of this kind is that it is not really a right in the modern sense, because it gives no protection to an individual by means of a correl-

ative duty. And Hobbes himself recognises this when he states 'But that right of all men to all things, is in effect no better than if no man had right to anything. For there is little use and benefit of the right a man hath, when another as strong, or stronger than himself, hath right to the same.' (cf.Macpherson,1967:3). In other words, a right which is just a physical liberty to do something is worth little or nothing. The legal and moral concepts of right insist that certain actions have some protection in relation to others, in view of the judgement that 'might is not always right'.

Another way of criticising the Hobbesian theory of natural right is by means of D.D.Raphael's distinction between 'rights of action' and 'rights of recipience' (Raphael,1965:207ff). A right of action, according to Raphael is rather like Hohfeld's liberty-right, defined in terms of absence of obligation on the part of the right-holder; a person may act in such a way if she wishes. On the other hand, the person has no claim against others to either help her to act or to refrain from interfering in her activity, as was noted earlier. A right of recipience, however, does involve obligations or duties on the part of others; one can expect something, some service, perhaps, from others. Hobbes's right of nature is a right of action not a right of recipience. If it is a basic protection and promotion of human needs, especially of the needs of weaker human beings, that makes the concept of human rights important, then they must be rights of recipience as well as rights of action.

For the other great populariser of the concept of natural rights or the 'rights of man', John Locke, such rights are indeed rights of recipience as well as being rights of action (though he did not use this form of language). Macpherson shows how Locke is an improvement on Hobbes with regard to the analysis of natural rights:

> The grounds for claiming Locke as a genuine natural rights man are apparently clear: (1) His natural rights are presented as effective rights, rights which others have a natural obligation to respect. (2) His natural rights, being less wholesale than Hobbes's, are more meaningful and more specific (e.g., the right of private appropriation and the right of inheritance). (3) Locke uses natural rights to establish a case for limited government, and to set up a right to revolution (1967:6).

However, for all the impressiveness of such an expression of natural rights, Locke ruins his reputation, in Macpherson's opinion at least, by overriding one of the limits of natural rights (with regard to property acquisition), 'thus removing the equality of natural rights' (Macpherson,1967:6 & 1964:197ff). Because of this justification of inequality regarding the accumulation of property the basic individualism of the theory of natural rights shines through even in Locke. 'Locke's natural man is bourgeois man: his rational man is man with a propensity to capital accumulation. He is even an infinite appropriator' (Macpherson,1967:9).

D.D.Raphael (1965), while accepting that Locke's natural rights are rights of recipience as well as rights of action, admits that as rights of recipience they are largely negative. The natural rights to life, liberty and property are essentially the right to be left free to live, left free to do as one chooses, left free to enjoy the fruits of one's labours (op. cit.,211ff). The positive rights to aid from others were hardly developed at all, unlike the modern concept of human rights. As Kamenka (1977) declares:

> The demand for rights in the seventeenth and eighteenth centuries was a demand <u>against</u> the existing state and authorities, against despotism, arbitrariness and the political disenfranchisement of those who held different opinions. The demands for rights in the nineteenth and twentieth centuries becomes increasingly a <u>claim upon</u> the state, a demand that it provide and guarantee the means for achieving the individual's happiness and well-being, his

welfare (op. cit.,5).

Though freedom from despotism and oppression is of importance, it seems clear that the rights of the seventeenth and eighteenth centuries were of more value to some groups than others. The benefit to those who already had property, education, and a reasonable quality of life must have been greater than to the poorer sectors of human society. Thus, natural rights which favour the relatively strong members of society and leave the weaker members to 'go to the wall' are a clear sign of individualism and egoism. (Richard Tuck (1979) shows how some treatments of rights in 17th century political writers tended towards political absolutism, in which individuals, by entering a social contract for the sake of peace, give up rights to resist even the unjust use of power by the sovereign. In other words, the 'rights' of rulers were held to be of such an absolute quality that personal 'inalienable' rights could be overridden. When a person enters a contract to avoid anarchy, he must be willing to risk the violation of personal rights in order to avoid greater harm through the breakdown of social order; cf. Tuck, chs 4&5,on John Selden and his followers.)

The theoretical criticisms of natural rights theory so far presented are further supported by the historical evidence of the practice of respect for rights in the American and French Revolutions. The equal rights of all men in the American Declaration of Independence to 'Life, Liberty and the Pursuit of Happiness' did not extend to slaves. In fact, the contemporary American constitution did not contain a Bill of Rights; Americans had to wait until 1791 for this. The Reign of Terror in France disappointed many of the European liberals who had expected so much from the Declaration of the Rights of Man and the Citizen (1789).

The moral criticism of the language of rights in the

wake of the French Revolution seems to have come equally from liberals, conservatives, and socialists to use the rather crude labels of popular political science. From the liberal point of view, Jeremy Bentham attacked the doctrine of natural rights in his Anarchical Fallacies (1843). Part of his criticism was conceptual. As a legal positivist, Bentham only had time for rights which had the sanction of law. Hence, 'natural rights' were a nonsense. But he also criticised the language of natural rights from a moral angle. On this point Jeremy Waldron (1987) states that 'by the mid-1790s he [Bentham] was convinced that talk of natural rights was not merely nonsense in a good cause, but 'terrorist language', 'mischievous' and 'dangerous nonsense' (Waldron,1987:40).

Bentham associated the Terror of the 1790s with the fall away from law legitimised in part by the rhetoric of natural rights. According to Waldron, Bentham was of the opinion that human life without positive law would be characterised by the warlike situation described by Hobbes as life 'before' the social contract. The Reign of Terror was ample evidence of the disastrous results of moving away from pragmatic legal sanctions used to control social life. Moreover, the language of rights, Bentham thought, could be used to obstruct much needed social reform which enlightened government might be expected to introduce. This might happen as a result of appeals to inalienable and imprescriptible natural rights belonging to individuals. What was needed as the moral standard for political reform, in Bentham's opinion, was the utilitarian principle of the greatest happiness of the greatest number.

Edmund Burke's Reflections on the Revolution in France (1790) represents a conservative reaction to rights-language. Again one can say that Burke's critique of the language of natural rights is partly conceptual and partly moral and political. Conceptually, Burke attacked the

French Declaration of The Rights of Man for its generality and for its 'metaphysical abstraction' (cf. Waldron, 1987:97). For Burke, slogans like 'Liberty, Equality, and Fraternity' could not be depended on to organise political life. Instead, what is required is a careful study of the circumstances of each 'civil and political scheme' (Waldron,1987:85). Morally and politically, Burke felt that the French Revolution had more or less 'thrown out the baby with the bath-water'. He admitted that the ancien regime was in need of reform, but he believed that the Revolution had done away with many of the good things in the traditional political system. The important values in his political morality were, according to Waldron, 'conservatism, caution and respect for establishment' (ibid.88). Instead of building on sound foundations such as these, the abstract theorists of the Revolution had given way to the anarchy of individual interpretations of rights. And even if the majority of citizens agreed on certain interpretations of rights, such a democracy only served to make Burke fearful of the tyranny of the majority, whereby the rights of minorities would be violated. Burke preferred the notion of a political elite ruling the nation, guided by and judged by the value of service to the common good.

The socialist critique of rights-language as found in the writings of Karl Marx concentrates on the fundamental contradiction between the 'Rights of Man' and the reality of capitalist society in which these rights are supposed to be implemented. Marx held that capitalists traditionally utilised the concept of rights to break down the feudal system, in order to insist on the alienability of land and the equality of the right to possession and acquisition. In practice, however, the language of natural rights tends to be used in an ideological way as a protection of the 'interests' of a minority group or class. As in Bentham, Marx felt that talk of rights can easily become a smoke-screen either to support the status

quo or to hide the refusal to bring about radical egalitarian reform. According to Marx, it is in the interest of the bourgeoisie to encourage the doctrine of rights at an abstract level, whilst the basic corruption of the social structure, which obstructs the implementation of the true doctrine of equal rights, is concealed. (cf.Marx's On the Jewish Question (1844) in Waldron,1987; Meszaros,1978:47-61).

Christian theologians have frequently recognised the individualistic and egoistic nature of the traditional doctrine of the rights of man. David Hollenbach (1979), for instance, cites the work of Macpherson (1964) in studying the rights doctrine of Hobbes and Locke. The conclusion is that 'the liberal rights theory is compatible with the presence of extreme want in a society, even when the resources necessary to eliminate it are present.' (Hollenbach,1979:15). This state of affairs is made possible by the liberal emphasis on negative freedom and defensive rights. Jose Miguez Bonino (1980) says of the eighteenth century rights proclamations: 'Human rights are defined in this stage in the perspective of the individualism that characterises modern thought. There is, no doubt, a primacy of the economic dimension of this individualism.' (Bonino,1980:25). Wolfgang Huber (1979) is yet another theologian to study the history of the concept of human rights, and he has this to say about the American and French revolutionary movements: 'Human rights were demanded equally for all; their formulation was not, of course, entirely free from the limitations of class consciousness, and their content bears the stamp of an attitude of bourgeois possessive individualism.' (Huber,1979:5).

All in all, then, the history of the concept of rights tends to have an inbuilt bias towards individualism and egoism. Often the kind of individualism and egoism hidden in the proclamations of the rights of man was of the group

or class variety, since there can be a group egoism or selfishness just as easily as there can be the self-centred preoccupation of single individuals. But the question remains whether this tendency gives sufficient reason for eliminating rights-language from present day moral vocabulary? Do the points made in preceding pages undermine the moral respectability of the language of rights?

Let me begin my response to the objection above with Gewirth's own answer. This involves what he entitles the 'Principle of Generic Consistency', which when applied to rights appears in the form: 'Act in accord with the generic rights of your recipients as well as of yourself.' (Gewirth,1986:338ff.). This principle is a version of the principle of universalizability or of generalization, which is widely held to be a necessary principle of morality. Dorothy Emmet (1966) has called this principle a 'constitutive rule':

> A constitutive rule in morality would be a necessary condition for a practice being called a moral practice at all. One candidate for such a constitutive rule has been called by Mr Hare and others 'Universalizability' (Emmet,1966:59).

Emmet goes on to explain this point. It involves the rule 'treat like cases alike, and different cases differently', or put more precisely, 'if it is right to treat A in a certain way, it is right also so to treat others who resemble A in the relevant respect.' (ibid.). The practical value of this formal criterion of ethics is that 'it excludes arbitrariness in the sense of inconsistency in the application of a principle.' (ibid.,62).

Now Gewirth shows that human rights as moral concepts necessarily involve the criterion of universalizability or the principle of generic consistency. Thus all humans must

seek to respect the basic rights of others as well as claiming them for themselves. One cannot accept that there are other humans in the world besides oneself, but refuse to accord these others human rights one claims for oneself. One could argue this point from a purely prudential position, that one will not get far in having one's interests protected if one fails to recognise a corresponding duty to respect and protect the interests of others. However, a more satisfactory argument appeals to the general relationship that must exist between individuals sharing the same basic nature. Being a member of the human race involves a kind of kinship which demands some level of altruism in living a human life. The language of human rights reflects this altruism of kinship in theory, though in practice humanity tends to be distracted by what has been called above (2.5) the 'ethics of strangers'. The notion of equality which was seen to be a necessary assumption of the theory of natural or human rights is a difficult assumption to accept in practice. If it were accepted in practice, so many of the duties and obligations which are now thought to be related to charity or beneficence would be included in the category of strict justice. Because the hungry of the Third World are equal with the people of the First and Second Worlds only in terms of their abstract humanity their interests are not strictly respected. If the poor of the world could be seen as human in the sense of being part of the human <u>family</u> , then their 'rights' in justice could be truly respected.

I think that W.Huber is highly perceptive when he makes this comment on the famous slogan of the French Revolution:

> It is interesting to note, however, that the third element of the slogan, fraternity, did not find its way into the human rights documents of the Revolution. Fraternity is not a claim before the law but rather an attitude, a 'virtue' in the classical

sense of the term (Huber,1979:6).

What follows from this remark is the conclusion that the theory of human rights has long remained on the abstract level, accepting in an abstract manner the equality of all human beings, but missing out on the heart of this equality in the concept and virtue of fraternity. In other words, the concept of human rights, of respecting the basic interests of all humans requires some serious effort to see oneself as part of a universal family in more than a rhetorical or sentimental sense. Thus, there is an antidote to the historical individualism and egoism associated with the liberal human rights tradition in the almost forgotten, but central, aspect of fraternity, without which the concept of a human right remains abstract and without a heart. (For an interesting application of the concept of fraternity to the question of the just distribution of medical resources, cf. Campbell,1978:83ff.) In a sense, the doctrine of human rights has not failed, it just has not been tried or implemented as it should, by taking into account the challenge presented by its originators to see those far away as brothers and sisters rather than as strangers with little or no claim on one. The real challenge of the human rights tradition is to widen the circle of those regarded as equal and to see equality in a personal rather than in an abstract way. The abuse of the doctrine of human rights does not lead to an elimination of that doctrine as morally disreputable, since there is still a core truth which, once recognised, is at the heart of human moral endeavour.

There is some danger in admitting that the history of the doctrine of human rights is characterised in part by ethical individualism. The reason for this is that 'Individualism' is by definition a negative concept with heavily pejorative meaning. So, admitting the charge of individualism is a bit like admitting to the charge of

murder (another negative concept), and then trying to justify oneself. Steven Lukes (1973) says that:

> Ethical individualism is a view of the nature of morality as essentially individual. In the seventeenth and eighteenth centuries this may be seen as having taken the form of ethical egoism, according to which the sole moral object of the individual's action is his own benefit. Thus the various versions of self-interest ethics, from Hobbes onwards, maintained that one should seek to secure one's own good, not that of society as a whole or of other individuals (Lukes,1973:99).

I think I have shown already in a satisfactory way that the deep theory of human rights involves elements of altruism, equality and fraternity. The fact that the language of rights can be used in a reactionary way does not take away from the basic aspirations deeply embedded in the concept of universal human rights. I accept fully the statement of Alan Falconer of the Irish School of Ecumenics (1980): 'Rights, however, do not solely emerge in the conflict to secure the protection from interference by other individuals or groups. They also emerge as an aspiration. Human rights are values to be protected or encouraged.' (Falconer,1980:204). This should not be surprising in the light of Christian insistence on the sin of humankind. Just as rights arise because of human conflict, a conflict which is often destructive, so the attempt to overcome such conflict can itself be infected with the sin of the world.

In spite of the dangers of individualism and egoism associated with the language of rights, it is important to note that individualism is in fact a perversion of a closely related value, namely, 'individuality'. The American Roman Catholic theologian Daniel Callaghan (1965) has written in praise of individuality, arguing that Catholics must avoid two extremes, one of complete 'docility to authority combined with conformity to the prevailing piety of the Catholic community', the other of

'pure self-direction..., a refusal to accept any part of the collective whole.' (Callaghan,1965:163). Callaghan then states that 'it is only as a unique individual that one can be a Christian.' (ibid.).

Another theologian, Thomas Ogletree (1985) recognises that in Christian ethics 'in shifting the locus of origination in moral experience from the dynamics of self-integration to the call of the other, the moral subject appears to lose all rights before the other.' (Ogletree,1985:51). And in response to this threat he speaks up for 'being good to self', or as he puts it 'The first word may be: enable enjoyment, and not: be responsible to and for your neighbour. Grace is prior to commandment.' (ibid,53). Jurgen Moltmann (1980) is highly critical of Christian apologetics for defaming the 'will to self-actualisation as irreligious', but he insists that there is a kind of self-actualisation that has nothing to do with egoism but is part of the love commandment 'love your neighbour as yourself' (Moltmann, 1980:188). This is applied directly to the notion of claiming one's own rights. It is part and parcel of God's command to love self properly.

Note how some modern authors have stressed that human rights are really protections for individuals against the state (cf. McCloskey and Wellman, op. cit.). And recall Dworkin's concept of rights as trumps against utilitarian considerations of general welfare. Consider, too, the emphasis in marxist states on social and economic rights rather than on individual freedom of speech and conscience. Given these positions, there is still a need to protect the individual human being against group tyranny. There is a richness which individuals bring to the notion of human nature in practice which must be respected by the language of rights, as has been noted already in the discussion of Macdonald's critique of natural rights (cf.2.6).

Does respect for individuality mean that the common good of society is thereby harmed? Not necessarily, must be the answer. It is difficult to see how the common good can be based on the violation of individual rights; indeed, this is one of the common arguments against cruder forms of act-utilitarianism, that it is willing to sacrifice individual basic goods for what it considers to be the general welfare. There must not be an exaggeration of the tension between the good of individuals and the good of groups, including the state. In fact, humans often have a desire to cooperate in communal activities.

John Finnis (1980) devotes a chapter of his book Natural law and Natural Rights to showing this general desire to act with others in ways that bring about individual well-being as well as the well-being of others (Finnis,1980:Ch V1). Very often, in fact, the individual well-being fades into the background as cooperating actors concentrate on some shared good, as in 'play'. As Finnis puts it, 'the central feature and good of play is that the activity or performance is valued by the participants for its own sake, and is itself the source of their pleasure or satisfaction.' (ibid.,140). In other words, it is a mistake to think of all people acting all the time from motives of personal satisfaction. Clearly, Finnis believes that humans can be altruistic in many situations, especially in relationships of friendship and family. But, interestingly, he insists that altruism, the going out of oneself in service to others, requires that one has something individual to give.

> ...[O]ne can give nothing to a friend unless one has something of one's own to give. One cannot even have him to dinner if one has no food save one's own ration. You say, let him bring his own food, it is the sharing that counts. But what am I sharing with him? My shelter, warmth, living-space. You say, have dinner together in the communal eating place. But still I have to give him my company, my attention and interest, which I thereby deny to someone else (ibid.,144).

If the common good is to be served, then, the individual contributions of the community must be protected in the first place. The common good is built on the riches of the individual personalities making it up.

Finally, in defending the concept of rights against the charge of individualism and egoism, one can underline the various movements in recent times which struggle to obtain respect for the rights of different oppressed groups. One need only think of White liberals in South Africa sacrificing their own security in order to draw attention to the human rights abuses visited on the majority Black population. And there are many other examples of individuals and groups acting in dedicated support for the rights of minority groups from basically altruistic motives (cf. Smith,1986:557, for references to such individuals and groups: Martin Luther King; Feminists; and Liberation Theologians). In other words, not all rights-claims are self-centred and egoistic.

3.3 The Adversarial Objection

This objection may perhaps be seen as an extension of the preceding one. Recalling the notion of rights as claims, or as entitlements which enable one to claim, the present objection is that such a possibility of claiming tends to thrust people into adversarial and 'potentially coercive relations whereby each seeks to impose burdens on others for his own benefit' (Gewirth,1986:332).

Another way of expressing this position is found in Simone Weil's remark to the effect that

> rights-language has a commercial flavour, essentially evocative of legal claims and arguments. Rights are always asserted in tones of contention; and when this tone is adopted, it must rely upon force in the background or else it will be laughed at (Weil,1949; cited in Young,1978:).

Here the morally jarring quality of claiming one's rights is underlined. The objection seems to bring one to the other extreme from those who oppose rights-language from a legal positivist approach. Bentham considered moral rights as nonsense because they lacked legal sanction to back their exercise. Now Weil holds that such an approach would only do more harm than good because of the contentious nature of claiming against others who fail to respect rights.

The Christian moralist, Stanley Hauerwas, has also concentrated on the adversarial tendency of claiming rights. In his Suffering Presence (1986) Hauerwas discusses the appropriateness of references to the rights of children and is heavily critical of this approach to their welfare. But his dissatisfaction with the application of the language of rights to children is part of a wider dissatisfaction with the language of rights in general. He sees the language of rights as a reflection of society's individualism and goes on to say that

> Rights are necessary when it is assumed that citizens fundamentally relate to one another as strangers, if not outright enemies. From such a perspective society appears as a collection of individuals who of necessity must enter into a bargain to insure their individual survival through providing for the survival of the society. (Hauerwas,1986:128)

From this point of view, Hauerwas suggests, one can see, how inappropriate it is to speak of children having rights, for it assumes that children are merely another interest group in need of protection from other interest groups, 'including their parents' (ibid.,125).

Moreover, the morally jarring effect of claiming one's rights is reminiscent of Stephen Toulmin's attack on 'the tyranny of principles' (cf.2.5 above). Toulmin speaks of 'the stresses of lawsuits' in the United States - 'the homeland of the adversary system'- all the time seeing

this as a symptom of the 'ethics of strangers' (op. cit.,35ff.). When persons are in the habit of claiming their rights at a moment's notice, is not this a sign of the 'ethics of strangers'? Nevertheless, Toulmin recognises that there are limits to the adversarial system in practice in the U.S., which takes some of the bite out of the adversarial objection:

> Even in the United States, the homeland of the adversary system, at least two types of disputes - labor-management conflicts and the renegotiation of commercial contracts - are dealt with by using arbitration or conciliation rather than confrontation. This is no accident. In a criminal prosecution or a routine civil damage suit arising out of a car collision, the parties are normally complete strangers before the proceedings and have no stake in one another's future, so no harm is done if they walk out of court vowing never to set eyes on each other again. By contrast, the parties to a labor grievance will normally wish to continue working together after the adjudication, while the disputants in a commercial arbitration may well retain or resume business dealings with one another despite the present disagreement. In cases of these kinds, the psychological stress of the adversary system can be quite destructive:...(ibid.,35).

I feel that this example provides some answer to the adversarial objection and the morally jarring quality of rights-claims. There are in certain circumstances ways of claiming rights, involving more or less peaceful arbitration, which accepts that some kind of harmonious relationship beneficial to all parties in the dispute is to be maintained afterwards. In other words, the morally jarring quality of rights as claims is limited to those situations where the persons claimed against remain as strangers, outside the circle of one's intimacy. And in so far as one makes an attempt to draw strangers into that circle of intimacy, one has to show greater care in claiming in an adversarial sense. In fact, ideally the adversarial sense of rights as claims should be relegated to situations where relationships between persons have broken down to such an extent that they have to be separ-

ated, each receiving what is due as a result of the life of the relationship. I am thinking here in particular of marriages and friendships which break down. I envisage the language of rights in such circumstances as a way of salvaging some justice from the situation. In other words, I accept that there will be some situations in which rights-language must be used against a background of bitterness and hurt; but I insist that this use need not be the primary use of the language of rights. People can accept that conflict is a part of life and that mutual rights in such situations can be negotiated and upheld.

The adversarial objection appears to be related more to the language of claiming rights than to the language of having claims and entitlements. The presumption of this objection seems to be that all rights must be claimed and that all right-holders will naturally spend their time taking their neighbours to court. But, of course, this presumption is false. In a number of cases of possessing rights, claiming is inappropriate because of the circumstances. For instance, Robin Downie (1969), in his discussion of the 'right to criticise' mentions the case of the tutor who has the right to criticise a student, but should not exercise this right in certain cases. e.g. close to an examination, when such criticism might seriously undermine the confidence of the student (Downie,1969:122-123). Claiming the right to criticise would be singularly inappropriate at such a time.

Another way of expressing the limits to claiming rights is by reference to the distinction made already between mandatory and discretionary rights. Where a right is discretionary the right-holder is permitted to waive her claim more or less at will. Indeed, whenever the emphasis on claiming rights becomes too insistent, it needs to be supplemented by the emphasis on the power to waive rights-claims. Sometimes, in order to avoid the bitterness of adversarial proceedings, right-holders' waiving of rights

may amount to acts of supererogation. Needless to say, the power to waive a right is severely limited in the case of mandatory rights (and does not exist in the case of inalienable rights), and whenever a right is waived the motives and reasons of the person should be examined, since waiving rights may be an easy option for some, rather than having to face up to necessary (though ultimately positive) conflict which comes with claiming.

I should also mention the limits to claiming associated with manifesto rights as described by Feinberg (1970). These 'claims' refer to basic needs of persons which for various reasons cannot be fulfilled in the foreseeable future. Feinberg gives the example of young orphans in the Third World and their needs as a case of possessing such a right (op. cit.,153). It is inappropriate for the poor children of Latin America to claim a right not to be poor, since the immediate possibilities of alleviating their poverty are non-existent. As a long-term goal, respect for the rights of the poor of the Third World, in the sense of individualised, specific needs, regarded as basic in the developed lands, is something to be encouraged. But attempting to claim the impossible or the utopian makes little or no sense. Rights-claims should be kept as specific and as practical as possible if they are to be correlated with workable duties or obligations. (cf.O'Neill,1986:100, 'Holders of rights can press their claims only when the obligations to meet these claims have been allocated to specified bearers of obligations.')

In spite of the adversarial objection, then, I prefer to follow the example of Feinberg and stand by the value of claiming:

> Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon. They are

> especially sturdy objects to "stand upon," a most useful sort of moral furniture....This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone (ibid.,151).

3.4 Can a Good Man be Harmed?

This question is the title of an article by the philosopher Peter Winch (1972). Indirectly, the question and the article present a further kind of radical scepticism about the rights people ordinarily claim. If Winch's argument is successful, so many of the claims humans make today will have to be set aside as unimportant, or, worse, as morally distracting.

A 'Harm' and the Good Man

Winch presents a number of examples of the thesis that a good man cannot be harmed, but feels 'absolutely safe'. Let me mention just one of these examples. In modern times, Wittgenstein (1965:8) has noted an experience which he says is not uncommon, namely, 'the experience of feeling absolutely safe.' What sense can one make of this remark?

It appears that Wittgenstein regarded such safety as being a possible feature of one's fitting into the moral language game, within which an absolute value is given to the pursuit of the good. For Wittgenstein the moral language game commits the participator to certain values which bind him or her uncompromisingly. One can see how binding moral values are by contrasting two uses of the term 'ought'. If I am a mediocre tennis player and someone challenges me saying 'You ought to play better', there is no obligation to heed this advice or command. There is nothing wrong in saying, 'I am quite happy play-

ing at this level.' On the other hand, if I behave badly, by lying for instance, I cannot set aside the criticism 'You ought to be truthful.', by saying 'I am quite happy being a liar'. To say something like that is to fail to understand the moral language game and to put oneself outside of it.

Thus, within the moral language game the language of duty and obligation in relation to the pursuit of the good has an absolute status. As long as one pursues the good one cannot be harmed. In other words, according to the line of argument I am following, the good man can be harmed only when he gives in to sin. His fall from grace is the only real tragedy from the moral point of view.

How is scepticism about the language of rights derived from the notion that the good man cannot be harmed? The immediate answer is that so much of the language of rights is directed towards protecting people from harm in the ordinary sense of pain and suffering and deprivation. In fact, claims to be protected from suffering have proliferated to a bewildering extent, distracting humanity from the 'one thing necessary' - pursuing the good. To give serious attention to any 'harm' other than moral harm may be in itself harmful. It seems to me that this objection works best in conjunction with the two previous objections of individualism/egoism and the adversarial trend of modern society, perhaps even adding further a kind of 'slippery slope' argument.

When persons begin to claim all sorts of rights to what might be called 'pre-moral' goods (that is goods or values seen in the abstract apart from particular situations of choice by moral agents), e.g. health, education, employment, participation in government, and so on, there is a real danger of undermining one's moral character through entering into conflict with others, making false claims, exaggerating one's needs. It is so easy to be

drawn into sin by the power which claiming gives the individual. According to this point of view, even seemingly unselfish claims for the sake of others must be viewed with some suspicion, since fighting for the rights of others can be just as damaging morally as fighting for one's own rights. In both cases the 'fighting' or 'struggle' can be harmful in the true 'moral' sense.

The approach so far described can be applied in practice in at least two ways. On one hand, one could adopt a high stoic approach which counsels a radical detachment from the goods of this world. This would allow a person to minimise the pain of losing his or her participation in such goods, and there would be less temptation to make claims which add to the conflict and disharmony of moral life. The advice, in other words, is that people should not get too interested in their health or wealth (to take just two examples), because such goods are precarious, and when they are deprived of them depression and anger may be the result. Then they may start making claims against others, getting into the adversarial trend and ultimately falling away from pursuit of the Good. On the other hand, there is a less radical approach which permits the enjoyment of goods like health and wealth, but is willing to let these goods go without a struggle rather than get involved in 'sinful' conflict.

B 'Harm' and the Faithful Person

It is at this stage that I can introduce a clearly theological note. In my opinion, the philosophical discussion of the possibility of limiting the concept of harm to moral harm, the harm to moral character, has marked Christian echoes, beginning in the early Church and appearing again and again throughout Christian tradition.

Many of the New Testament writings reveal the struggles of a small, powerless and persecuted group. The earliest

strands of the literature, especially the letters to the Thessalonians and Corinthians, are marked by strong eschatological expectations which colour the moral outlook of the early community (cf.Sanders,1986; Schnackenburg,1965: Partll, chl; Ogletree,1984:chs.4&6; Houlden,1973:9-13; . There is an air of detachment from worldly goods in Paul's advice to the Corinthians on adopting a state of life, such as marriage (I Cor.7:26,31). Some Christians took detachment to an extreme and decided to abstain from working, and Paul had to warn against this in his second letter to the Thessalonians (2 Thess.3:6-12).

Clearly, New Testament morality, like Old Testament morality before it, emphasises community as opposed to individualism. Speaking of pauline morality, John Ferguson (1973) comments on this communitarian emphasis:

> The keyword is here koinonia, which is variously rendered fellowship, communion, contribution, distribution, partnership, sharing and other terms in such a way as to obscure the fact that it is a common thread running through the New Testament. The word comes in Acts, of the common life of the church (2,42), and of the sharing of material resources (4,32). Both passages are to be seen in the light of the immediately preceding gift of the Holy Spirit (Ferguson,1973:73).

No wonder, then, that Paul takes the Corinthians to task for the disputes which undermine the peace of the community. In fact, some of these disputes between Christians were brought out into the open in the pagan courts, to Paul's evident disgust. 'To have lawsuits at all with one another is defeat for you. Why not rather suffer wrong? Why not rather be defrauded? But you yourself wrong and defraud, and that even your own brethren.'(I Cor.6:7-8,RSV.). These words appear to be a critique of individual selfishness in claiming against others, when individual sacrifices ought to be made for the sake of the good of the community. Moreover, there is

a hint of the view that a good man cannot be harmed ultimately, since the apostle counsels allowing oneself to be wronged rather than doing wrong. This is not to say that Paul failed to see such sacrifices as harmful to some extent, only that such suffering was ultimately worthwhile in the light of God's fidelity to his promises. For instance, one should keep in mind the eschatological perspective of the Christian community seen as joining in the judgement of the world when the End at last comes (I Cor.6:2,cf.Houlden,1975:11).

One further scriptural example which is related to the safety of the good man comes from the first letter of St. Peter. On the subject of the various duties which the Christian must undertake, the writer refers to the duties of servants to their masters (I Pet. 2,18ff.). The duty of service is not just to the good and kindly but also to those who are harsh. There is no merit in suffering when one is being punished justly, but there is merit in suffering injustice patiently. The reason given for this is that it is part of the Christian's imitation of Christ, who suffered for their sakes and left them this suffering as an example to follow. Christ's redemptive suffering has brought humanity, seen as straying sheep, back to the shepherd of their souls. In the midst of suffering there is still a sense of safety in the hands of God. Commenting on the admonition to suffer humbly in this epistle, R. Schnackenburg (1965) states that this 'is not an ethical admonition making a virtue out of necessity, but springs from the religious insight, that God alone can change the ultimate darkness of this world era, that only he can "exalt you in the time of visitation" (5:6).' (Schnackenburg,1965:370).

The objection may now be presented which argues that there is little sense in protesting against injustice, and claiming one's rights, when one is part of a tiny persecuted sect in a backwater of the Roman Empire.

Surely the early Christian subordination to the ruling powers was simply a sign of the wise policy of 'keeping one's head down' and 'not making waves'. And, one might add, when Christianity became more established it soon found its voice in claiming what it thought was its due. This objection may well be partly valid, but it can easily enough be countered with the claim that the Church was merely following its Lord's advice to be 'as wise as serpents and as simple as doves'(Mt.10:16). However, I think there is more theologically to the examples mentioned above than a concerted attempt to close ranks and provide a respectable front for jews and pagans alike.

It seems to me that the New Testament doctrine on the essential safety of those who love God and do good remains as a valuable critique of efforts to brand all kinds of suffering as harmful, and which leads to the bewildering proliferation of rights in modern times. For one thing, the suffering that Christians must bear does not come to an end when the crudest of persecutions are over. The rejection of immoderate personal claims is not merely a feature of the time when the Church expected an imminent Parousia. In every age the call goes out to Christians to embrace 'the fellowship of Christ's sufferings'.

In his article, 'The Fellowship of his Sufferings', Barnabas Ahern (1965) situates this conception in the life and teaching of St. Paul:

> Through conversion St. Paul gained a new spiritual life. On the road to Damascus he received from the risen Christ the messianic gift of the Holy Spirit who ever after inspired and ruled his activity as that of a true son of God. For the Apostle this meant, in the expressive phrase of Philippians 3:10, that he had come to know Christ, "in the power of his resurrection." But that was not all. He affirms in the same breath that, through conversion, he came to know also "the fellowship of his sufferings." This significant addition is in accord with the polarity of all Pauline thought which joins death and resurrection as two inseparable aspects of the same

> salvific mystery, whether in the life of Christ or in the lives of Christians (Ahern,1965:95)

It would be a serious mistake, however, to think that the call to fellowship in the sufferings of Christ is limited to the group of apostles or to a certain period of time at the start of the Church's history. This call to fellowship in the sufferings of Christ and through these sufferings to the glory of the resurrection, is the basis of the Christian reality of baptism into Christ. For all the baptised there is a call to follow the Master through suffering and death into new life. There is no other way for the Christian to be saved. Ahern remarks on this striking feature of Paul's doctrine on Baptism:

> For him sacramental death marks the point of departure for an altogether new life, in which the Christian ever remains "dead to sin, but alive to God" (Rom.6:11). This is possible only because, in Baptism, the Christian shares the very Spirit of Christ which endures forever in the body-person to which the new member is united (ibid.,107).

This sacramental death must not be unduly 'spiritualised', as if no struggle is involved in accepting Baptism in the first place, and afterwards in living out the implications of the new life in the Spirit. Consider, for instance, the doctrine in Galatians where Christians are said to have 'crucified their flesh with its passions and desires' (Gal.5:24). On this, Ahern warns that 'The word "crucified" is not a mere figure. Baptism gives a share in the death which loving fidelity to God's will produced in Christ, so that Paul could write, "With Christ I have been nailed to the cross" (Gal.2:19) (ibid.,108). (For a truly profound discussion of this passage in relation to 'Grace as power in, and as mercy towards, man',cf. R.Niebuhr,1943:vol. 11,111-123) There is a real personal struggle in passing from the life of the flesh to the life of the Spirit, and walking in the Spirit itself is a constant challenge. Thus there is a

constant tension in the Christian life between what has already happened to the individual in his or her calling and what needs to be achieved. Ahern puts it well,

> Christian life, therefore, involves an enduring paradox. The Christian, on the one hand, lives on an eschatological plane, sharing the risen life of the Savior and His love for the Father. Paul writes in the name of every Christian, "I live, now not I, but Christ lives in me" (Gal.2:20). On the other hand, the activity of the Holy Spirit has not yet transformed the whole of man, nor the whole of the world around him (ibid.,109).

In the Pauline doctrine discussed so far, then, there is a sense of realism about the suffering that must be endured by Christians, and, at the same time, a sense of confidence in the possession of the believer by God's Spirit (cf.Marshall,1946:269 'The gift of the Holy Spirit has profound ethical as well as religious results.'). This is particularly clear in Romans where Paul describes the 'terminus of Christian experience, "If we are sons, we are heirs also: heirs indeed of God and joint heirs with Christ, since we suffer with him that we may also be glorified with him. For I reckon that the sufferings of this present time are not worthy to be compared with the glory to come to be revealed in us" (Rom.8:17f)' (Cf. Ahern,1965:111).

With regard to the language of rights the Christian perspective on being involved in the fellowship of Christ's suffering tends to undermine what I regard to be one of the main pillars of the ethos of claiming rights. This ethos assumes that suffering and pain are always harmful, have no redeeming features, and must always be the object of claims for relief. The Christian tradition, as I have outlined it, is not willing to accept such an assumption about the sufferings of this world (cf.Hauerwas,1986:165ff. for a good description of human ambivalence in the face of suffering.). Some sufferings

are inevitable and represent a vital aspect of the Christian way of life (cf. Hick,1966:358-363,for the view that a world without suffering would be impoverished because of the lack of opportunity to practice certain virtues,eg. compassion and courage.). Baptism is both a 'tomb and a womb', the Christian must die in order to live, and the painful death to self, to all that opposes God's will, continues throughout one's earthly life. The claiming of rights, on the other hand, tends to become linked with strenuous efforts to avoid all suffering. This form of language is associated with individual autonomy and power over one's life, whereas Christianity tends towards a recognition of the necessity of human weakness, service of others rather than developing personal power and autonomy, and a total dependence on the grace and will of God. There is even the temptation presented by the language of rights of becoming like the pharisee of the Gospel, marching to the front of God's house and claiming against Him.

The Christian way offers a theology of suffering which relativises the concept of 'harm'. Clearly, the most serious harm that can occur to the believer is alienation from God through sin. Earlier I mentioned that this New Testament view of 'harm' has been echoed down through the ages in the Christian tradition. Before offering some criticism of this stance in relation to the language of rights, I want to discuss briefly two examples from the Christian tradition which attempt to remain faithful to the theology discussed above.

3.5 The Franciscan Tradition

The fact that Francesco Bernardone remains one of the most popular saints of the Christian Church and has such a wide appeal even today, suggests that his interpretation of, and living out of, the Christian faith should be taken

seriously. Unfortunately, the attractiveness of St. Francis for many is based on a superficial and sentimental understanding of his life and teaching. If there is one thing that St.Francis was not, it was the caricature of a nature loving hippy that is sometimes presented for public consumption. He was above all a man who took the imitation of Christ seriously, an almost literal imitation which concentrated on the poverty and obedience of Jesus. The question of poverty has always been a controversial one in the Franciscan tradition, often narrowly focussing on a material interpretation of this evangelical virtue (cf.Esser,1970:228-240; Moorman,1968:chs 16&25). More important than this, however, is a more profound interpretation of poverty, as mentioned in the following quotation from Simon Tugwell (1985):

> In the later Franciscan tradition it is precisely material poverty which is regarded as crucial, and this in turn comes to mean little more than legal poverty; but for Francis himself the essential poverty is seen in the abandonment of rights, in the abandonment of one's own will. In one of his Admonitions he is quite explicit: 'Who is it who abandons everything he possesses? It is the person who yields himself totally to obedience in the hands of his superior (Admonition 3:3) (Tugwell,1985:129).

Of course, Francis would not have expressed his vocation in terms of the language of rights, since that form of language was unknown in his day, but Tugwell is wise to use this language to describe and explore Francis's basic attitude. Consider again the language used earlier to elucidate the rights concept - claims, entitlements, powers and liberties - and it has to be said that Francis turned these on their head. The 'Poor Man of Assisi' called his followers fratres minores or lesser brothers. This means in the words of Tugwell:

> Francis wants his friars to be minores precisely in the sense that they are never to be in a position to control things, they are to be at the mercy of whatever happens (ibid.,129).

But control over things and avoidance of being at the mercy of whatever happens is the basic rationale of rights language, the very opposite of the Franciscan spirit, which is sometimes said to be a recovery of the true spirit of the Gospel. Francis did not seek security and protection for himself or his followers. This is a position founded on a particular understanding of divine providence. As Tugwell expresses it, 'If this is God's world, ruled by his providence, we ought not to have to protect ourselves against it. Whatever happens is God's gift to us.' (ibid.,130). Tugwell sees this whole stress on 'radical unprotectedness' as based on a Christological foundation. Francis wished to imitate the unprotectedness of Christ. This is the true background to Francis' love of nature, a love which was far from sentimental:

> The exposure to nature which is a genuine part of Franciscan tradition is not primarily a matter of fresh air and fun, it is most typically a sharing in Christ's exposure to maltreatment and rejection. Francis was no romantic, sentimentalising and idealising the raw life of nature; he knew very well what happens to people who strip off the customary ways we have devised of insulating ourselves against the world outside: they get crucified. But it is only on the basis of a readiness to be crucified that redemption can operate (ibid.,132-133).

It is reasoning of this kind that explains the sense in which Francis of Assisi must have experienced what Wittgenstein was trying to express in the position that the good man may feel safe, though suffering harm in the ordinary sense of that word. In Francis's case, the feeling of being absolutely safe is based on nothing else but a profound faith in the working of a loving divine providence. He was a firm believer in the phrase of St. Paul, 'All things work for the good of those who love God' (Rom.8:28), and this means <u>all</u> things, even the painful things.

This radical life project of the early Franciscan tradition was as 'scandalous' to people in the Church in the twelfth century as it is today. Many of his advisers urged Francis to adopt the rule of some already existing order which would not be so severe and demanding, but he refused to consider such a step. Pope Innocent gave verbal approval to the original rule of St.Francis around 1209, and was probably wise to withhold written approbation until Francis showed that this seemingly impossible life could be lived over time, and without falling into the unorthodoxies of his predecessors, such as Peter Waldo. The example of the Franciscan Order down through the centuries often gives the impression that the radical approach of its founder needs to be 'adapted' for the sake of lesser men and women than the 'Poverello'. Still, the possibility of a simple Gospel style of life without the distractions which lead one into concern for one's rights against others maintains a certain attractiveness.

3.6 Christian Pacifism

In the contemporary world, even within the Christian tradition, radical pacifism is a strictly minority position. The 'right' to self-defence and the doctrine of the 'just war' are widely accepted as a more realistic approach to the violence of humankind. However, there are some voices that sound out in favour of the pacifist stance.

Take Stanley Hauerwas, for example. In The Peaceable Kingdom (1984), he shows a clear hostility to much of the rights-language currently in vogue, especially when a right to violence for the sake of justice is in question:

> Therefore Christians cannot seek justice from the barrel of a gun; and we must be suspicious of that justice that relies on manipulation of our less than worthy motives, for God does not rule creation

> through coercion, but through a cross (Hauerwas,1984:104).

Hauerwas is very much in line with the Franciscan critique of Christians trying to get into positions of control; this is not the strategy of the peaceable kingdom. In fact, as eschatological people, according to this theologian, there is a very real sense in which Christians must be out of control: 'Living out of control' is part of the virtues of patience and hope. And he goes on to say:

> For the irony is that no one is more controlled than those who assume they are in control or desire to be in control. It is the rich above all whose wealth gives them the illusion of independence, separateness, of being in control. But all of us in one way or another willingly submit to the illusion that we can rid our world of chance and surprise. Yet when we do that our world becomes diminished as we try to live securely rather than well (ibid.,105).

This seems to me to be an admirable repetition of what Tugwell has portrayed as the theology of St. Francis. If the language of rights is used as an instrument of control in the sense that Hauerwas has described, then moral scepticism about this form of language is to be taken very seriously indeed. The reference above to living 'securely rather than well' is a recognition of the risks of discomfort arising from pursuit of the Good.

Indeed, Hauerwas becomes even more explicit in his reservations about rights-language in his criticism of a 'natural law' ethic:

> For example, natural law is often expressed today in the language of universal rights - the right to be free, to worship, to speak, to choose one's vocation, etc. Such language, at least in principle, seems to embody the highest human ideals. But it also facilitates the assumption that since anyone who denies such rights is morally obtuse and should be "forced" to recognise the error of his ways. Indeed,

> we overlook too easily how the language of 'rights', in spite of its potential for good, contains within its logic a powerful justification for violence (ibid.,61).

When it comes to the Christian strategy for facing aggression, Hauerwas discusses the argument between the Niebuhr brothers, Richard and Reinhold, from the pages of The Christian Century in 1932. This concerned the proper Christian response to the Japanese invasion of Manchuria. Hauerwas tends to side with the pacifism of Richard which involves a way of 'doing nothing' which is still theologically significant (ibid.,Ch.8). Christian inactivity, for Richard Niebuhr and for Hauerwas, is the type founded on a belief in a force in history that will ultimately create a different kind of world from the one currently experienced. Moreover, the Christian way of doing nothing entails an attitude of humility, the recognition that man's righteous indignation is far from being actually righteous. Christians must wait for God to act, and, in the meantime, stand aloof from movements such as nationalism and capitalism, uniting in a higher loyalty and preparing in this way for the future. Either way, human life on earth seems touched by tragedy. For Reinhold Niebuhr this stems from the imperfect, even sinful, response of Christians to violence, which is still a necessary one. For his brother Richard and for Stanley Hauerwas, on the other hand, tragedy stems from refusing to respond to violence with violence and thus running the risk of being abused by violent men (Hauerwas,1984:145). The pacifist tends to believe that it is better to suffer evil than to do evil. Those who refuse to take such a radical stance are forced to speak of necessary evil in a just war, or the lesser of two evils, or they attempt to glorify retaliatory violence as righteous indignation.

One of the major influences on the theology of Hauerwas is of course the work of John Howard Yoder. Many of the themes brought out above concerning the radicalism of

Christian responses to suffering and evil find parallels in his work, especially in his The Politics of Jesus (1972). He tends to be critical of the mendicant tradition in its attempt to justify a literal imitation of Christ's life by reference to the Gospel story (Yoder,1972:133-134). The early Christians were not concerned with imitating the poverty of Christ, or the fact that he was a carpenter. Paul's advice on remaining unmarried does not refer to the example of Jesus, though tradition holds he remained single. The only area of the earthly life of Jesus which is set before Christians for their imitation, is, according to Yoder, the carrying of the cross.

With regard to this concept of sharing in Christ's cross, the fellowship of his sufferings, Yoder is quite specific:

> The cross of Calvary was not a difficult family situation, not a frustration of visions of personal fulfilment, a crushing debt or a nagging in-law; it was the political, legally to be expected result of a moral clash with the powers ruling his society. Already the early Christians had to be warned against claiming merit for any and all suffering; only if their suffering be innocent, and a result of the evil will of their adversaries, may it be understood as meaningful before God (1 Pet.2:18-21; 3:14-18; 4:1,13-16; 5:9; James 4:10) (Yoder,1972:132).

Interestingly, Yoder cites the case from the letter of Peter where servants are required to be subordinate even to harsh and unjust masters. Note, too, that this kind of suffering is 'meaningful before God' in Yoder's opinion. Once again, I am not claiming that Yoder denies that pacifism brings harm to individuals. It is simply the case that harm of one type has to be embraced to avoid a more ultimate kind of harm - eternal death.

Finally, on this question of pacifism, what is most interesting in Yoder's work is his insistence on the realism of a pacifist ethic. In his fifth chapter he

instances ways of non-violent resistance used successfully by the Jews against the Romans, and he entitles another, later chapter 'Revolutionary Subordination' (ibid.,90-93;163-192). This is important as a critique of the assumption that violent resistance to evil is practically always necessary. It can also be used to question the need to claim rights in situations of conflict. Yoder and Hauerwas thus encourage Christians in particular to expend more energy in the area of ethical imagination before, and often instead of, getting involved in violent adversarial positions. Hauerwas believes that ethical imagination is often very limited in what he calls 'Quandary ethics' (1984:4,128). He claims that there can be solutions to moral dilemmas which transcend the narrow ethical imagination of the protagonists; but so often the protagonists are tied to traditional formulas which are unsatisfactory from the viewpoint of the peaceable Kingdom.

3.7 Response to the Preceding Sections

I wish now to respond to the preceding sections which centre on philosophical and theological scepticism concerning the concept of 'harm' which underlies so much of human rights-claims.

First, I want to admit the strength of what has been said, especially from the Christian point of view, as a support for the position that rights-language needs to be severely moderated if it is to be morally valuable. In particular, the approach argued above rightly attacks the view that one can have an automatic right against any and all harm (in the ordinary sense of the word) that might touch one's life. There can be an obsessive fear of any suffering or deprivation which paralyses people from getting on with life, and this fear may be expressed in part by the urge to claim rights against others. (Simon Tugwell (1980), in commenting on the beatitude 'Blessed

are those who mourn..', states that 'our libertarian age, with its frantic quest for pleasure and excitement, is oddly characterized by an increase in the number of people complaining to their doctors that they can no longer feel anything at all.'(1980:61). In the light of this trend, the world needs to hear the words of Christ blessing humanity's negative feelings.) Moreover, I believe there is some sense to the position that moral harm is one of the most serious kinds of harm to be guarded against in life.

Having admitted the value of the objections to some extent, I must still voice some reservations about the details of the objections. For instance, some care must be taken in accepting an anti-naturalistic position, which seems to be the case in Winch's article. There is a danger in making a rigid distinction between pre-moral and moral values, such that the latter come to be transported into a mysterious world of their own, entry into which is by private intuitions alone.

Without getting too deeply immersed in the argument over ethical naturalism, I shall mention what I regard to be the main features of the controversy. In her article 'Moral Beliefs' (1958), Philippa Foot answered the question 'Why be Moral?' by saying that the virtues can only be recommended if they constitute a good to the virtuous man. In other words, the reason for being moral is that it pays to be moral in the ordinary sense in which people live in peace and harmony and enjoy the good things of life. Foot believed that immoral people may prosper for a while but in the long term will be unhappy. (Foot's original position was an attempt to revive a form of ethical naturalism in reaction to the metaethical theories - emotivism and prescriptivism - in vogue at the time. Hare's prescriptivism, in particular, tended to create a wide gap indeed between facts and values, and left the discernment of values at a highly subjective, almost

arbitrary level. Since writing in 1950, Mrs. Foot has considerably reworked her ideas, cf.Foot,1978:xi-xiv.) In reply to Mrs Foot, the philosophers D.Z. Phillips and H.O. Mounce (1970) argued that morality cannot be reduced to prudential factors in this way. In fact, they argued that people can remain prosperous and relatively happy (in the sense meant by Foot) by adopting an evil life-style. If a person is powerful enough and cares little for public opinion a life of crime certainly does pay.

So, according to Phillips and Mounce, a person can only be moral for moral reasons. The good person does not reduce morality to prospering or faring well in an everyday sense, though no doubt he or she will want to fare well so long as that is possible without doing wrong. For the anti-naturalist position, to prosper or to fare well must be understood morally in the first place; there is something irrational in claiming that an evil person can 'prosper', since prosperity is so intimately linked with goodness. But is not this an example of a stipulative definition, deciding to link prosperity and happiness with moral goodness? There is indeed a sense in which this definition appears as stipulative, but I feel that it may still have wide appeal, so much so that it takes on the quality of a discovery or revelation. One may seem to be forcing a definition on others, whereas in fact one is appealing to others to recognise a common enough experience. In the case of being morally good, it is quite a respectable position, I think, to hold that this is such an important human value that its absence must entail some unhappiness. The major problem, however, in speaking in this way is that 'happiness' is generally understood in a psychologically subjective way. Thus, it is difficult to convince the person who enjoys the effects of wrong actions that he must be unhappy 'deep down' or 'subconsciously'.

The main drawback associated with the position of

Winch, Phillips and Mounce is that it makes too much of the conflict between maintaining one's moral character and participating in what I have called pre-moral values. Usually, moral goodness involves the harmonious arrangement of these values by the individual moral agent. Note that reference to health and life as being pre-moral values does not imply that such values are unimportant, or indeed that they are unrelated to moral life. As used in recent Roman Catholic morality, the category of the pre-moral relates to values important to human beings seen in an abstract way, before being chosen by individuals in particular circumstances (cf. articles by Jannsens, Fuchs, and Schuller, in Curran & McCormick,1979; note that they vary in their terminology, speaking of 'ontic good', 'non-moral good', 'physical good', as well as 'pre-moral goods'.But these terms are practically synonymous). It is only when these values are taken in a personal sense, when they become the object of individual choices, and even claims, that they become truly 'moral' values.

Thus, personal moral character does depend on the attitude one has towards 'pre-moral' values, and the ways in which one seeks to participate in them together with others. Indeed, there may be occasions when the basic values of human living may have to be sacrificed for the sake of moral character and moral goodness, for instance, martyrs give up the possibility of enjoying many goods, rather than act directly against a basic good or value. But the point is that personal moral goodness always involves a positive respect for pre-moral goods or values. For the most part, then, moral agents can maintain their moral goodness and prosper in the ordinary sense of enjoying pre-moral values. In fact, moral goodness is based on respect for such values.

The second drawback in concentrating on personal moral goodness or character at the expense of all other values is that it may be self-defeating. In avoiding moral harm

one can be willing to sacrifice the good of others too easily. In order to avoid the adversarial objection, one may avoid making claims for others in the cause of one's own moral rectitude. The aim of moral goodness seems to be like the aim of happiness - neither should be sought directly; they come by concentrating on something else, especially the welfare of others. The New Testament insistence on living according to the Spirit and avoiding the things of the flesh is not supposed to lead to personal navel-gazing and obsessive concern with one's own spiritual and moral progress. By concentrating on the teaching and example of Christ one comes to live an altruistic, loving way of life. At a later stage of Christian history, when the mendicant orders began to appear, some members of the older monastic orders were shocked at the notion of 'religious' moving about outside of the cloister, but the good of others was regarded by the friars as a justification for making the world their cloister, even at the cost of committing some 'unavoidable sins' (cf. Tugwell,1979:134-139)).

It is extremely difficult to avoid the scope of rights-language, even in radical moral and religious systems such as Franciscanism and pacifism. For if a vision such as these is deemed central to life, how can one let it go without a struggle? Although Francis wanted to live a precarious and unprotected life, he still had to consider the right to follow conscience, to say yes to the revelation he felt came from God. This is why Francis so stubbornly refused to adopt any other existing rule of life. He was driven by the message of God, as he saw it, and in this case the least one can say is that the right to live according to the Gospel followed from the duty to live it. One can think as well of Francis' companion, Clare, who begged of the Church the right to live in complete poverty in imitation of the spirit of Francis. Pope Innocent 111 'granted this unique and unheard of privilege somewhere between the conclusion of this Council

[Fourth Lateran] in 1215 and his death on 16 July 1216. This rarest of privileges ever granted held that the Poor Ladies of San Damiano were allowed to live without communal property (possessions) and that no one could compel them to accept possessions.' (Van Leeuwen,1987:66). The claims of Francis and Clare seem odd in contemporary terms; who today wishes to live insecurely? But for those enchanted by the Christian Gospel, poverty was paradoxically the greatest treasure.

With regard to pacifism, something similar can be said. A radical right is being claimed, a right of conscience, not to be forced into forms of self-defence regarded as immoral and unChristian. It involves the claim to be a conscientious objector in wartime, and perhaps the claim against other Christians as well as against non-believers to consider pacifism as a legitimate response to violence.

Ultimately, there must be at least one right that can be claimed, namely, the right to be morally good, to follow one's conscience (cf.Cahill,1980:277). The problem remains as to how wide the scope of this right really is. If one takes ethical naturalism seriously and underlines the importance of pre-moral values, then rights to participation in these cannot be excluded, though they may need to be moderated when conflict arises. Much more can be said about the importance of claiming participation in pre-moral values, but I shall hold this over until the next chapter.

3.8 Conclusion

In a recent book review, David Little states that, 'At present, it is difficult both to live with and without "rights-talk".' (Little,1988:40). I hope that the last three chapters have illustrated the truth of this statement. In particular, this chapter has underlined the drawbacks and disadvantages of rights-language from a

moral point of view. Yes, the language of rights can be a cover for individual and group selfishness, for instance, when human rights remain at an abstract level and when the equality built into the basic concept is not cashed in practical terms. I argued that the the virtue of fraternity is needed to save human rights from abstraction and self-centredness.

In response to the criticism that the language of rights leads to an adversarial approach to human conflict, the answer must be 'Yes and No'. 'Yes' in the sense that the 'limited intelligence' and 'limited sympathies' of humanity (Warnock,1971:ch 2) can lead to situations where justice can only be achieved by making claims against those reluctant to accept their duties. 'No' in the sense that, not all rights-claims demand such an adversarial background; in some cases arbitration and negotiation can proceed on a civilised basis, which avoids a major part of the bitterness arising from personal conflict. It remains the case that humanity needs at times to stand up for rights rather than acting as a door-mat for unscrupulous elements.

This last remark is also partly the answer to the critique related to the question 'Can the good/faithful man be harmed?'. Insofar as being morally good demands participation in certain basic pre-moral values, then claims to such participation in my own life and in the lives of others must be taken seriously. Of course such claims can multiply to an extent that scandalises many and which may damage the respectability of rights-language in general. For instance, the obsessive desire to rid humanity of all pain and deprivation is not a good basis for developing a set of realistic rights-claims. (In fact, one might say that the distinction between claims and liberties mentioned above (1.3 &1.4), is a sign that people cannot expect to escape all harm in their relations with others.)

From the Christian perspective it is equally clear that suffering and pain are not the unmitigated disaster they are sometimes made out to be. They can be part of God's providence in general, and part of the Christian vocation to share in the fellowship of Christ's sufferings in particular. There remains a sense in which the greatest harm that can befall a faithful person is moral harm, and avoidance of this can call for the sacrifice of pre-moral values. However, for the most part human flourishing consists of harmonious participation in a set of non-moral goods. And such participation requires the ability to claim as well as the ability to waive claims when the circumstances are apt.

Chapter 4

Theological Foundations of Rights-Language

4.1 Introduction

In the preceding chapters I have taken seriously conceptual and moral scepticism concerning the language of rights. In the last chapter in particular I recognised some force in the moral objections to this form of language, as these were expressed by both secular philosophers and Christian ethicists in a shared attack. I accept that some moderation of rights-language, especially regarding human claiming, should be kept firmly in mind; however, I remain firm in my belief that the language of rights is conceptually and morally respectable in spite of possible abuses. Ultimately I come down on the side of the latin tag '*Abusus non tollit usum*'. Just because the language of rights can be used in a vague and indeterminate manner does not mean that one has to resort to a radical conceptual scepticism, and likewise just because this language can be abused morally, does not force one to embrace a radical moral scepticism concerning it.

In this present chapter I begin with a brief consideration of the Christian Church's attitude towards the concept and language of rights. This is a continuation, to some extent, of the section in the preceding chapter where parts of the Christian tradition were seen to be wary of the idea of human claiming in certain circumstances. This wariness will be encountered again, but also a more positive approach to rights in modern times will be shown. The question of a particular Christian contribution to the foundations of rights-language will be discussed in the light of the wider discussion of the distinctiveness of Christian ethics. I shall argue that there is such a distinctiveness, and

that in application to the language of rights it operates through the distinction between 'absolute' and 'relative' dignity.

4.2 From Hostility to Respectability

Three types of classical hostility to the natural rights tradition were mentioned in the preceding chapter, labelled 'liberal, 'conservative', and 'socialist', and represented by Bentham, Burke, and Marx, respectively. To this hostile reaction I can now add the Roman Catholic Church. This Church has come a long way since the encyclical Quanta cura (1864) and the Syllabus of Errors (1864) of Pius IX to the encyclical Pacem in terris of Pope John XXIII in 1963. This is the road from hostility to respectability or hospitality. The language of rights has, so to speak, come in out of the cold.

Why was the Catholic Church so hostile to the 'Rights of Man'? The answer is given, I think, by John Langan in his essay 'Human Rights in Catholicism' (1982)

> Catholicism's institutional sympathies during most of the nineteenth century were with a conservatism which had its roots in the ancien regime. It is important neither to conceal nor to overstate these sympathies. The Church, especially in France, experienced the proclamation of human rights in 1789 as a very cold and hostile wind, and it cannot claim for itself a significant place in either the theoretical or practical struggle for human rights in the eighteenth and nineteenth centuries. Human-rights theory in an explicit and politically dynamic form confronted Catholicism as an alien force and it has taken Catholicism a long time to appropriate it (Langan,1982:31-32).

Langan's point of view is supported by John Henley's more recent article in the Scottish Journal of Theology (1986), where he declares that,

> until recently at least, the church and theologians have played little part in the human rights move-

> ment. Whatever is made of the appeals to a divine source in earlier statements and declarations about human rights, it has to be acknowledged that the movement has derived its inspiration largely from humanistic ideals,... Hence it has been thought inappropriate for the 'Johnny-come-lately' of theology to suggest that the cause of human rights would best be served by being given a theological foundation (Henley,1986:366-367).

Henley also mentions in his article the Church's concern about 'the egalitarian and self-sufficient vision of humanity found in much of the talk about human rights from the time of Thomas Paine and even earlier, though with more caution, of John Locke' (ibid.,367). Expanding on this he claims that:

> The inability of most Christian churches to accept this egalitarian outlook will have been due not only to their profoundly undemocratic structure and temper, but also to the confidence placed by humanists in man as the measure and master of all things. The declaration in which such confidence is most apparent is the French and it is noteworthy that the figure of the Deity is here most shadowy. It may also be significant that this declaration accompanied a revolution that went most disastrously wrong;.. (ibid.,368).

According to Bernard Plongeron (1979), the reaction of the Catholic Church to the Rights-Declarations has to be seen in terms of a dialectic between 'anathema and dialogue' (Plongeron,1979:39). At first the 'Rights of Man' were anathema because of their emphasis on freedom of thought and opinion, and because the privileged place of Roman Catholicism was thought to be in jeopardy. Pius VI's brief Quod aliquantum (1791) singled out for special criticism those articles of the French Declaration of 1789 which underlined rights to freedom of conscience in general and with regard to religion in particular (articles 10 and 11). Because the religion of the revolutionaries was in question, it was felt that freedom of conscience applied to matters of faith might lead to 'indifferentism', the idea that all kinds of religious

faith are of equal validity. Plongeron states that Pius saw in these rights-claims a 'sinister conspiracy':

> This equality, this liberty, so highly exalted by the National Assembly, have then as their only result the overthrow of the Catholic religion, and that is why it has refused to declare it to be predominant in the realm, although it has always enjoyed this title (Pius VI,1791 cf.Plongeron, 1979: 41).

With time, however, Plongeron shows that hostility to the revolutionary principles softened:

> But when, after 1793, Catholics were forced to recognise the irreversible and expansionist progression of the 'immortal principles of 1789', they were to change their tactics. Rather than perpetuate an absolutely sterile denunciation of the Declaration of Rights, they preferred to claim for the Catholic religion the safeguards offered by article 10 on liberty of conscience (ibid.,41).

It appears that Roman Catholic attitudes to rights of freedom of conscience varied according to whether Catholics were in a majority or minority position vis-a-vis other denominations. In a majority position, as in France, the Church's privileged position was emphasised and the rights of minorities played down. In a minority, and often persecuted position, as in the American colonies on the eve of Independence, rights to freedom of conscience were regarded as truly liberating.

Nor should it be forgotten that the papacy at that time was itself a political state; it had not yet lost the papal states. So the move towards democracy included in the declarations must have been as upsetting to the bishops of Rome as to other political leaders. As Peter Hebblethwaite (1982) puts it:

> The negative view of human rights in the nineteenth century of course had a lot to do with the existence of the Papal States, for the popes behaved like any

> other threatened autocrats. They censored the press, imprisoned or executed rebels, and regarded liberal ideas (including talk of human rights) as the plague. These time-bound considerations affected them deeply and shaped the dominant tradition of the magisterium (Hebblethwaite,1982 :193).

The watershed in the history of the Roman Catholic Church's growing regard for the language of Rights is, of course, the encyclical Rerum novarum (1891) of Pope Leo XIII. According to David Hollenbach, 'It was with Leo XIII that the Church began to move from a stance of adamant resistance to modern Western developments in political and social life to a stance of critical participation in them.' (Hollenbach,1979:43).

What was most significant about this encyclical was its protest against the economic and social injustice which had been exacerbated by the Industrial Revolution. As the Irish theologian, Donal Dorr (1983), puts it:

> Though the content of Leo's encyclical was important and remains important, what was perhaps even more important was the character of the document as a cry of protest against the exploitation of poor workers. It is not so much the detail of what Leo had to say that was significant but the fact that he chose to speak out at that time, intervening in a burning issue of the day. His intervention meant that the Church could not be taken to be indifferent to the injustices of the time. Rather, the Church was seen to be taking a stand on behalf of the poor (Dorr,1983:11-12).

Since Dorr's main interest in studying the social teaching of the Roman Catholic Church's magisterium is to document the growth of an option for the poor, he is careful to point out an early move in this direction at this stage. Although Leo rejected socialism as an answer to injustice and set clear limits to the operation of the state in the lives of individuals, he felt that the state had a special duty of care for the weaker members of society:

> ...when there is question of defending the rights of individuals, the poor and badly-off have a claim to especial consideration. The richer class have many ways of shielding themselves...whereas the mass of the poor...must chiefly depend on the assistance of the State (RN,29;cf.Dorr,1983:15).

Of course, Leo's encyclical makes mention of rights and duties, not just of the state, but also of employers and their workers (cf.Camp,1986). Here it seems the Pope remained singularly conservative, as can be seen in his reaction to conflict between classes. Dorr mentions two possible strategies open to people struggling for industrial justice. One way is to call upon employers and industrialists to repent and be converted from their life of exploitation. Along with this, the workers are urged to be patient in waiting for the results of this conversion. The other way is 'to animate the poor to demand their rights. They would be encouraged not simply to wait patiently for justice but rather to confront the rich and powerful when this proves necessary.' (op. cit.,19).

Now Dorr suggests that the first strategy above is closest to the mind of Leo because of his conviction of the importance of stability in society. It appears that Leo XIII wanted change in society, but a change 'from the top down' rather than 'from the bottom up'. Dorr holds that 'He issued a ringing call to conversion to the people who held economic power. But what if this call goes unheeded? Then it appears that the poor working class have little option but to put up with their sad situation.' (ibid.,19-20). This general approach leads one to wonder if the language of rights with its emphasis on claiming has been recognised in its proper light. One gets the impression that Pope Leo is more interested in encouraging the powerful to recognise their duties to others than in enabling the weak to stand up for themselves in demanding their due. In other words, the

language of rights in use here seems to be of a paternalistic kind, where one power (the Church) attempts to claim rights for those with no power against another group (industrialists and the state) who have economic and political power.

It is not my task to cover the whole development of the Church's use of the language of rights in her social doctrine; indeed, others such as Hollenbach and Dorr have covered much of this ground in their own work (cf.the articles in Curran & McCormick,1986,; also cf.Elsbernd, 1986,Schooyans,1980 and Hamel,1984). Clearly there is a development from Leo XIII to John XXIII's Pacem in terris, and further development in the documents of Vatican II, the Synod of Bishops, and the writings of Pope John Paul 11. Most significant, perhaps, is Pacem in terris, which gives 'an explicit, though qualified, endorsement of the Universal Declaration of Human Rights' (Langan,1982:28). In this encyclical is found what Hollenbach calls 'the most complete and systematic list of...human rights in the modern Catholic tradition.' (Hollenbach,1979:66). Important in this context is the fact that the encyclical thus includes two main categories of rights - civil and political (cf. Articles 1-21 of the Universal Declaration) and social and economic (Articles 22-28 of the Declaration) - in a way that takes on board rights emphasised by both liberal democratic and socialist political traditions.

Still, this encyclical has been criticised, by Langan for instance, for not going as far as Vatican II in its declaration on religious freedom (op. cit.,29). Langan points out an ongoing struggle in the doctrine of the Roman Church here:

> Part of what was being worked out in Pacem in terris is the problem of reconciling the rights to freedom of belief and expression with the obligatory aspects of such values as truth, the common good, and the

> moral virtues - a problem which continues to trouble liberal democracies (ibid.,29).

In the language of rights, the tension here is between an approach which is still too impressed with duties and obligations, such that the favourite right becomes the mandatory right (often a disguised duty for the right-holder) and which gives a minor role to discretionary rights and the right to be wrong or in error.

Note too the growth of humility within the Catholic Church regarding the practice of rights. The Synod of Bishops in Rome (1971) has this to say about the Church's obligation to respect rights 'within her own house':

> While the Church is bound to give witness to justice, she recognises that anyone who ventures to speak to people about justice must first be just in their eyes. Hence we must undertake an examination of the modes of acting and of possessions and life-style found within the church herself (No.40;cf.Hebblethwaite,1982:196).

In this way the Church has come a long way from the position of simply claiming her own rights against others, in the sense of protecting her own institutional needs rather than the relevant needs of all her members.

The remote history of Protestant response to the doctrine of human rights is not easy to uncover; however, the more recent developments within the Protestant traditions are reasonably well documented. For instance, Jurgen Moltmann has written a useful article on this subject (Moltmann,1978).

Moltmann claims that the World Council of Churches played a supportive role in the production of the Universal Declaration of Human Rights. In particular, Moltmann singles out the work of that Council's 'Commission of the Churches for International Affairs'

(CCIA). It contributed to the codification and defence of the later human rights blueprints, e.g. the 1966 International Covenants, eventually ratified in 1976.

Moltmann stresses the importance of the conference organised by the CCIA at St. Polten in 1974, when the subject of discussion was 'Human Rights and Christian Responsibility'. This was important, in Moltmann's eyes, because of the presence of representatives from Eastern European countries and the Third World. They helped the conference make 'a convincing correction to the one-sided western conceptions in that it drew up a catalogue of basic human rights, which begin with the 'right to life' (Moltmann,1978:182;cf.Rogers,1975:128).

In 1977, at the centenary meeting of the World Alliance of Reformed Churches held at St.Andrews, a document entitled 'Theological Basis of Human Rights' was accepted as the 'first step towards an ecumenical 'Christian Declaration on Human Rights' ' (cf.Miller,1977). Plans for a document of this type go back to the General Assembly of the World Alliance in Nairobi (1970), when it was decided to embark upon a study programme on the subject of the theological basis of human rights. Moltmann himself played a part in this study, following on intensive work carried out by member-churches.

Another study concerning human rights was decided upon by the Lutheran World Federation at its assembly in Evian in 1970. Six years later, a summary conference was held in Geneva and the results were published in the following year under the title 'Theological Perspectives on Human Rights'. The main authors were Heinz-Eduard Todt and Wolfgang Huber (Huber & Todt,1977).

Before moving on to consider the possibility of a distinctive Christian approach to the concept of rights,

I would like to draw attention to an article by J. Robert Nelson (1982) in which he warns against adopting certain stereotypes regarding denominational approaches to rights. His main thesis concerning rights is that they are concerned with freedom. He insists that freedom or liberation are primary code words in the New Testament, and that in his person and his teaching Jesus was the Liberator (Nelson,1982:1). But how have the Christian churches lived up to this example? Nelson replies:

> Of the three main divisions of Christianity, Protestantism enjoys the best, but not an unsullied, reputation for securing, extending, and enhancing human freedoms. Indeed, there is a popular, well-preserved stereotype which portrays Protestant history as a series of successes in emancipating people for the enjoyment of greater freedom. The contrasting corollary to this image is that of Roman Catholicism as a perennial inquisition (ibid.)

Though there are elements of truth in this stereotype, Nelson directs attention to the fact that 'Ambiguity taints the entire history of Christianity insofar as human rights are concerned.' (ibid.,2). He is especially critical of early Lutheran and Calvinist stress on obedience to civil authority. And most interesting of all, is the reference to the Protestant representatives form Eastern Europe at the already mentioned St. Polten conference, who, greatly influenced by socialist emphasis on social rights as opposed to individual rights, tended to be highly critical of the Western claims to individual freedoms. Ironically, it is in Poland, a predominantly Roman Catholic country in the Communist bloc, that the struggle for individual rights of free speech and the organisation of labour in free unions has been predominant. So what has happened to the stereotypes of Protestant individualism and Catholic repression of individual freedoms? The traditional stereotypes are clearly breaking down.

4.3 The Distinctiveness of Christian Ethics

Before I can consider the question of providing a Christian foundation for rights, the prior question of the possibility of a distinctive Christian ethics has to be faced. This debate has raged of late particularly among Roman Catholic theologians (though one should not forget the important contribution made by James Gustafson (1975)). In the following pages I shall rely heavily on Vincent MacNamara's discussion of the issues in his Faith and Ethics (1985).

I begin with MacNamara's account of the different ways in which religious faith may influence moral beliefs and practices. There may be a causal relationship between religious beliefs and moral beliefs. This means that a person may learn about moral right and wrong, what she ought to do morally, from some religious tradition, e.g. the commandments of the Old Testament or the teaching of Jesus in the Sermon on the Mount. There can be a psychological relationship between religion and morality insofar as religious beliefs can motivate someone to act in a particular way morally. Thus, for instance, a person may decide to forgive another person following on the example of Christ. Without this example the person may realise the goodness and rightness of forgiving in the abstract, but not be able to 'bring himself' to actually do it in practice. There is also a possible ontological relationship between religion and morals. This involves the belief that the goods or values of this life derive from a divine source, that created value depends on uncreated value - the goodness of God. The last relationship mentioned by MacNamara is that of 'epistemological dependence' and entails that at least some moral positions held by Christians 'cannot be intelligibly arrived at or supported without the framework of faith' (op. cit.,96). This is the most radical form relationship between faith and morality,

because it appears to underline the possibility that the content of morality may differ according to whether one is a religious believer or not. (For further discussion of the various possible connections between religion and morality,cf.Davies,1982:ch 10; Baelz,1977:chs 6,7,&8.)

On the question of epistemological dependence of morality upon religious belief, Macnamara discusses the debate between two schools of thought in Roman Catholic moral theology. On one hand, the so-called 'Autonomy' school allows the possibility of there being causal, psychological and ontological links between religious belief and morality, while refusing to accept epistemological dependence (cf.Fuchs,1970; Schuller,1976; Curran,1974). On the other hand, there is the so-called '<u>Glaubensethik</u>' (Faith-Ethic) school which holds that all four types of relationship are possible, and thus that Christian ethics is highly specific (cf.Ratzinger,1980; Delhaye,1973; Rigali,1978). Put simply, and perhaps simplistically, the 'Faith-Ethic school tends to claim that the content of morality may be different for Christians; while the 'Autonomy' school of thought tends to deny this, allowing that Christian belief is important in giving specific motivation and context to the moral life. As will be seen, the differences between these groups hinge largely on how one understands concepts like 'content' of morality and 'motives' for acting morally. (One should note as well that mention of 'schools of thought' should not be taken as an assumption that every theologian in each group holds exactly the same views on the subject. Obviously the writers mentioned are categorised in their particular group because of a common trend or motif in their approach to the study of this particular sphere of ethics.)

The areas where the content of Christian ethics is supposed to be different from humanistic morality are mentioned by MacNamara as follows:

> There are values, it [the Faith-Ethic school] says, such as poverty, virginity, renuntiation of power, humility, modesty. There are demands to receive the Eucharist, do penance, preach the Gospel. There is the New Testament's new vision of marriage, of the world, of hope. There are attitudes of joy, thankfulness, prayer, indifference to the world (op.cit.,96).

This list looks at first sight to give strength to the Faith-Ethic approach. However, the 'Autonomy' approach has its answer. Firstly, it is not impossible for humanists to value poverty, in the sense of living a simple life in solidarity with the poor of the world. Also it is doubtful whether virginity is a style of life open to Christians alone. But what of specifically religious realities such as receiving the Eucharist and preaching the Gospel? One strategy used by the Autonomists to get around this objection is to make a separation between strictly moral values and religious values. Preaching the Gospel or receiving sacraments, if they are commands, are not moral commands. The point here, according to MacNamara, is that many contemporary moral philosophers (Frankena,1970; Foot,1958; Warnock, 1971; Williams,1973) are sceptical of any attempt to see acts directed towards God as truly moral. This is because of:

> the widely accepted view about the definition of morality which requires that normative judgments, if they are to qualify as moral, must meet a material social criterion pertaining to the distribution or promotion of non-moral good or evil among sentient beings (MacNamara,1985:102).

One can see why the 'Autonomy' approach has such attraction for certain theologians. In first place, it is in line with traditional 'natural law' theory, which insists upon a common grasp of moral truth by all humans independently of divine revelation, though not independent of God's gracious gift - natural law is a reflection of the eternal law after all. Secondly, it

avoids the problem of two kinds of morality in the world, one, a minimalist kind for unbelievers and the other, a more challenging one for Christians. And related to this, is the possibility of arguing rationally with other humans, believers and nonbelievers alike, regarding what is required for persons to maintain and promote their humanity.

Still, the odd thing about this debate is that in some ways all involved in it seem to agree on the fact that Christian ethics does have something distinctive to recommend it. The disagreement is on where exactly this distinctiveness lies. Does it lie in the realm of content or in the realm of motivation?

The answer to this question depends on the scope of what one holds as the content of morality, and also on distinguishing carefully the place of motivation in making moral judgements. In other words, one has to take into account both 'act-evaluation' and 'agent-evaluation' in humanistic and Christian ethics.

A. The Content of Christian Ethics

Regarding the content of morality, I pointed out that there is sometimes a tendency to separate off 'purely religious realities' like receiving sacraments and preaching the Gospel from ethics or morality. But it is easy to protest against such a compartmentalisation of life. Even in terms of the required 'material social criterion pertaining to the distribution or promotion of non-moral good or evil among sentient beings', a strong argument can be made in favour of including 'religious rituals' in the moral category. Much has been written of late concerning the relationship between liturgy and justice that shows the moral challenge involved in the Christian's sacramental life. Reception of the Eucharist, for instance, cannot be so spiritualised that

it enables Christians to forget that the 'body of Christ' is found starving in the world as well as in the sacred species offered on the altar (cf. Lane,1981; Kilmartin, 1980; Duffy,1980. The sacraments are not just spiritual nourishment for people, 'in this world, but not of it'; they point to the divine interest in this world through creation, incarnation and redemption, an interest which humans must imitate in daily life.

So, too, with prayer: the traditional Thomistic view of prayer of petition is that the Christian is included in a special way in the providence of God, such that humans can actually bring about certain goods in this world that would not come about if they did not pray. This is the view of St. Thomas (Summa Theologiae, 2a2ae,83); Christians pray, not to change God's will, but within that will, in order to accomplish it. And some things will just not happen if Christians do not pray. I see no problem in accepting that prayer is a strictly moral obligation for those who accept such a doctrine of petitionary prayer (In fact, St. Thomas treats of prayer of petition under the virtue of religion, which is that section of justice that seeks to give God his due).

In this way, prayer is both directed to God and can have material effects on life in this earth (These issues have been discussed widely in philosophy of religion in recent decades: cf. Brummer,1984; Phillips, 1981; Richards,1980). Moreover, since belief in the power of sacraments and prayer demands religious belief, it would appear that part of the content of morality is religiously specific. (Oddly enough, one of the foremost of the theologians of the 'Autonomy' school, Joseph Fuchs, accepts that 'man's religious and cultic relationship to God is also moral conduct' (Fuchs,1970:16). This seems to suggest that the differences between the two 'schools' of thought must be distinguished, with proper care shown for the nuances of

each position, even within each school.

B. Motives and Reasons in Relation to Content

The other major problem I mentioned concerns the more subjective level of motivation. It is sometimes claimed that Christianity offers a special motivation to do what is morally right, though the particular act may be recognised as obligatory by the non-believer. MacNamara argues that the 'Autonomy' school tends to mix up motives and reasons at this stage, causing some confusion (MacNamara,1985:ch 4, especially page 103ff). What is this distinction between 'motives' and 'reasons'?

A great deal of purely philosophical analysis has been applied to the related notions of 'reason', 'motive', and 'intention' (cf. Ryle,1949; Anscombe,1957; Kenny,1963; Flew,1966). In ordinary language in use each day, most people do not distinguish carefully between reasons and motives, and this is understandable since motives are always reasons in one sense of that term. By this I mean that a motive is at least an explanatory concept, explaining why a person acted in a certain way. However, in ethical deliberation one concentrates more on the justification of action than on its explanation. After all, an action may be explained by bad motives just as easily as by good ones. And in relation to justification, it is my opinion that the language of 'reasons' is more appropriate than the language of 'motives.

When I place the stress on reasons for acting, I am thinking of the reasons that justify an action or practice morally. When I do X for a morally justifying reason Y, the reason Y both explains why I acted and justifies the act. But I feel that the language of motives has more of a connection with explanation of actions rather than with justification. This is because

motive is more akin to psychological and causal aspects of action rather than the aspect of moral judgement. A motive characteristically 'moves' a person to act, hence the 'causal' element. From the psychological point of view, motives tend to refer to desires which move a person to do something. But having a (justifying) reason to do something need not necessarily move one to act, even if one is conscious of the legitimacy of the reason from the moral point of view. Thus, there is more of a gap between reason and action than between motive and action.

The ideal to be achieved in the moral life is always to act on the basis of justifying reasons, and this means being motivated by those reasons. This is an important distinction, since a person may have a notional grasp that an action is good, e.g. helping a poor man with alms, but may be moved to aid the man by a disreputable reason - to be admired by others as a 'charitable' individual. In this way, an agent can recognise a good reason for doing something and not be motivated to do it; e.g. a student who recognises that he ought to go to lectures, but gives in to the temptation to stay in bed. Or an agent can have a good reason for acting, and moves to achieve an object, but for another reason that fails to justify the act.

I believe it is a mistake to talk of motives when attempting to justify actions. Reasons justify actions and make certain motives respectable from the moral point of view. Often, indeed, the idea of 'having a good motive' is used as a type of excuse when the act posited is of questionable moral worth. For instance, in the discussion of active euthanasia there is sometimes this tendency to excuse acts of 'mercy killing' because of the alleged 'good' motives of friends and relations of the patient. I have no objection to arguments in this area if they are based on 'good' reasons instead of 'good'

motives; in fact, my point all along has been that truly 'good' motives must be based on justifying reasons. Just because an agent has some good in view and is motivated by this does not entail that the act is right. Goods must be seen in relation to one another if basic values are not to be sacrificed needlessly. However, good motivation may mean a good deal in evaluating the character of the agent, presuming that he or she has made a decent effort to discern the various values involved in acting.

Now the point that MacNamara wishes to make against the Autonomists is that Christian beliefs offer certain reasons for acting which are not available to those not sharing those beliefs. And this involves much more than the claim that Christian beliefs just motivate the believer. What MacNamara is saying, I think, is that one must take a step further back beyond motives to the justifying reasons which motivate people. And if one looks at these, one will find reasons based on religious beliefs, which distinguish the actions of Christians from non-Christians.

Justifying reasons for acting can vary. If my neighbour offends me in some way and I discern that I have an obligation to forgive him, I may have a number of good reasons for doing this. I may argue that I have an obligation to myself not to bear a grudge over time and that I 'couldn't live with myself if I failed to forgive'. Or I may approach forgiveness from the point of view of the other person's right to be forgiven. Perhaps the harm done was small, and the other meant no harm in the first place. I may reason that this person should not have to bear the brunt of my exaggerated bitterness. Then again, I may consider wider issues such as the bad example given to family and neighbours and the long-term effects of personal feuds on later generations and the peace and harmony of the neighbourhood. All of these reasons for forgiving my neighbour are basically humanis-

tic: there is yet no mention of religious reasons. So let me mention a few.

I am under an obligation to obey the command of Jesus to forgive others out of love (Lk.7:41ff.;17:3-4). Partly the reason for this is the fact that the Heavenly Father allows his rain to fall on just and unjust alike (Mt.5:44ff.) ; in other words, God is patient with all humans until their dying moment when they make their final option for or against Him (2 Pet.3:8-9,15). Part of the reason for forgiving others is that God has forgiven me in a most dramatic way and expects me to imitate him spontaneously (Mt.18:23ff.). I should also forgive if I wish to bring my gifts to the altar in worship and if I wish to pray the Lord's prayer honestly (Mt.5:24-25;6:14-15).

These religious reasons for forgiving my neighbour are also moral reasons, not only in the basic effect of bringing about a reconciliation here and now between persons, but also in so far as there are obligations of gratitude to God as to any other person when another does one a good turn. Moreover, if one knows something of one's benefactor's wishes, one should consider the possibility of acting appropriately. It also seems to be a good thing morally to follow the example of a man (Jesus) widely recognised to be a good model from the moral point of view.

Note that I am not saying that the religious reasons mentioned contradict the non-religious reasons for acting. There is an overlap between the reasons such that Christians may act from all of these reasons at different times. Obviously, people very often act morally without considering all the possible good reasons for acting. Often it suffices that a person has at least one justifying reason for acting morally. What I am arguing here is that Christians should try to consider the

religious reasons for acting as well as the reasons held in common with humanists. I believe that there can be a set of justifying reasons for acting morally and that the religious reasons offer a deeper, an ultimate grasp of the significance of the actions intended (cf. the warning of P.J.McGrath concerning the idea of having different reasons for saying that a type of action is right or wrong (McGrath,1969:59-61) . This is simply because of the basic Christian insight that moral behaviour is a vital part of the most important relationship a human being has, the relationship with God.

I believe, then, that it is necessary to distinguish among the justifying reasons for acting the 'natural law' reasons available to all men and women of good will and the reasons stemming from revelation which are available only to those called to faith. The fact that the latter bring one closer to the ultimate truth about human life and its supernatural destiny does not mean that the former are unimportant or can be ignored. The Christian has access to both kinds of reason; the non-believer, by definition, has access only to the former. Does this mean that the Christian has a superior morality to that of the non-believer?

The answer must be 'Yes and No'. The affirmative answer depends on there being a situation where the Christian looks carefully at the elements making up the moral judgement, all the facts open to any human observer of rational discernment, and also consults the Christian tradition for the relevant values. The resultant judgement takes together the best of human judgement together with God's wisdom as revealed in Scripture and Tradition. The negative answer applies to situations where believers attempt to force moral problems into a framework where traditional principles do not apply so easily and where general values in the tradition are misapplied in relation to new problems. Sometimes, then,

religious justifying reasons offer little practical guidance in particular areas of moral controversy (cf. Vatican II's Gaudium et spes,33, which states that 'The Church derives religious and moral principles from the deposit of God's Word which it safeguards, but it does not always have a ready made answer to particular questions.' cf. Mahoney,1984:2). This will become evident in the second part of this thesis in relation to the problems raised by the development of reproductive technology.

I want to be clear about the general trend of my argument over the preceding pages. I am claiming that, because of the gap that may exist between reasons for acting morally and being motivated to act morally, it is tempting to say that religious beliefs typically act as an extra pressure to do what is right when the natural law reasons fail to give the essential motivation. This of course may be part of the role of religious beliefs, but it is not in my opinion the only role or the most important role they play in moral deliberation and action. I am claiming that religious beliefs provide ultimate justifying reasons for acting morally without contradicting the fundamental natural law reasons. I use two different terms - 'ultimate' and 'fundamental'- to qualify the different kinds of reasons here because I want to maintain their complementary roles in moral reasoning within Christian ethics. Moreover, it must be clear that the meaning of 'content' of morality for me must involve reference to the agent's reasons for acting. In other words, I refuse to distinguish strictly between act and agent evaluation, making the former of key importance and making the latter peripheral. Any attempt to separate the two makes the analysis of moral actions too abstract. In fact, without consideration of the mentality of the agent, one must talk of human 'behaviour', but not of human 'action'.

4.4 Christian Reasons for Respecting Rights

If it is granted that Christian beliefs influence the ways in which members of the Church see the content of morality, how does this apply to the Christian's attitude towards rights? Firstly, following MacNamara's characterisation of the 'Autonomists', it can be argued that Christian beliefs motivate one to respect rights in general and religious rights in particular. Secondly, it can be argued that all rights pertaining to human beings are really derivative from God's rights. The concept of God 'having rights' may be said to be distinctively religious. As well as discussing God's rights against man one can also discuss the question of man's rights against God, and whether this makes sense or not.

A. Religious Rights

I mean by 'Religious Rights' claims to freedom of conscience regarding religious belief, the liberty to worship both in public and in private, the right to educate one's children in line with one's own beliefs, the right to preach the Gospel or spread doctrine in certain ways, the right to live out the 'vocation' of one's choice. Now, one does not have to be a Christian or a religious believer at all in order to respect these rights. As a legislator, an atheist or agnostic can see all of these rights as part of the general right of freedom of conscience, regarded as a key humanistic value. The personal beliefs of the legislator or indeed one's fellow citizens may be that religious belief is irrational and worthless, but such beliefs do not get in the way of respecting the right to be 'irrational'.

Still, it must be an advantage if the religious rights mentioned are respected for religious reasons. Instead of being motivated by a general respect for freedom of conscience, those within the legal system would then be

in a position to share in the justifying reasons guiding the believer to act in accordance with these particular rights. It seems more likely that the right to enter a monastery will be more readily respected by those who have some respect for that value than by those who think the choice wildly eccentric but harmless.

The advantage of sharing religious justifying reasons for acting in certain ways is probably best seen in situations where such personal and communal freedoms are in danger of being overridden in the name of, say, utilitarian reasoning. Then one may be able to argue in favour of respecting these rights because of one's personal grasp of the deep values involved. I conclude that, although believers and non-believers can respect the religious rights of others, the moral content of their activity is different because it is based on different justifying reasons. Note that the justifying reasons for the Christian include the basic natural law reason of respect for conscience, but also include the reason that God wills the freedom of his children to relate to him in certain ways.

B. God's 'Rights'

In my discussion of the relationships between faith and ethics I have argued that religious morality is truly morality insofar as its doctrines relate in part to human good in this world. At the same time the morality of Christians must be distinctively religious because moral acts and practices must be seen in some basic sense as God-directed. Any person committed to being moral must not be satisfied with merely bringing about certain good effects following on from a deliberately limited process of moral discernment. What is required is an attempt to discern the best justifying reasons for doing right. For the Christian these reasons ought to transcend the

fundamental natural law reasons available to all persons of good will. The reasons should have God as their object, not in the sense that God benefits from the actions, but in the sense that Christian ethics recognises an obligation of gratitude to God for creation and redemption (cf.Spicq,1963:35, 'But our essential reaction in the face of divine goodness, the one which will be the inspiring force of our moral life, is clearly that of gratitude.'); that life has an eschatological perspective in which Christians wait in longing for Christ's second coming; and that moral activity can be part of the process of deification.

Regarding the language of rights in particular, I would now like to discuss an approach which stresses the God-directed nature of all rights, since the basis of all rights is God's right against his creation. Among the theologians holding his position I shall mention three in particular: Emil Brunner (1947), Jurgen Moltmann (1980), and Franz Bockle (1980).

Emil Brunner discusses rights in the context of justice in his Christianity and Civilisation (1947-48). In ancient civilisation, Brunner informs his readers, justice and religion were closely linked, the civic order was expected to copy the divine order, the lex naturae to mirror the ius divinum. Thus, 'Justice is something holy; it is backed by divine order, divine necessity' (Brunner,1947:vol I,108). The lex naturae represents the orders of creation, which the Church fathers connected with the logos, in whom the world is created and finds its order. 'That is to say, the Christian Church never had a lex naturae conception other than a Christological one' (ibid.). Of course he admits that the pagans could know the moral law based on the orders of creation. They know something of justice, 'although the depth of Christian justice remains hidden from them' (ibid.).

The proper understanding of justice and rights, then, is, for Brunner, a theological one. He blames Grotius for the demise of the theological understanding of justice by driving a wedge between natural law and divine law (for a defence of Grotius,cf. d'Entreves,1951:50ff.). From then on, morality becomes increasingly secularised and is separated from its religious and metaphysical base. Brunner wants to retain the concept of 'natural right', but understood in a religious context, since all persons are sharers in the same dignity given in creation. The sovereignty of God above all must be stressed: 'Man has no rights over against God being his creature and property; he lives entirely from God's grace and mercy. Rights he has only in os far as God gives them' (ibid.,VolI,117-118). And in the second volume of this work, Brunner insists on this point:

> The first pronouncement about "belongings" or "rights" is this: that all things belong to God. The ius divinum is not in the first place the right which God gives, but the right which God has, and this right alone is absolute (Brunner, 1948: vol 2. 112).

In this passage, Brunner appears to be anxious lest people should think that God's gift of rights to them involves some claim against God, thus undermining his sovereign freedom.

A similar stress on the primacy of God's rights is central to Moltmann's view: 'We see the theological contribution of the Christian Church in the grounding of the fundamental human rights upon God's right to man.' (Moltmann,1978:193). Such a right is revealed, says Moltmann, in salvation-history especially in the scriptural concept of covenant. Here Moltmann tends to underline the rights and duties of those who enter into covenant, but he does not make clear whether rights under the covenant are against God as well as against one's

neighbour. One might think that this reference to God's rights is universally held in Christian theology, whereas in fact it is not, and Moltmann is realistic enough to recognise that this view is not even the Protestant view, least of all the Christian view. For instance, the Lutheran approach to this question as expressed by Todt and Huber rejects the notion of a 'Christian foundation' of human rights (Moltmann.1978:190; Huber & Todt,1977;cf. David Jenkins,1975:99, where he says that 'The struggle for human rights requires no theological justification.') Moltmann remains true to the Reformed tradition of Brunner in stressing a theological foundation in God's rights.

Franz Bockle makes plain the primacy of God's claim as central to the whole study of fundamental moral theology. Under the heading 'The Question of the Ultimate Basis of Moral Claim', Bockle has this to say:

> Instead of asking about the ultimate basis of moral claim, we could well ask about the limits of man's moral autonomy. This is also the special concern of our own enquiry. It is a simple matter of course for theological ethics that the ultimate basis of man's moral obligation is found in God's radical claim imposed on man. But everything depends on the way we understand this divine claim (Bockle,1980:5).

One wonders, having seen the admission of Moltmann as to the controversy over the question of a Christian foundation for rights, whether Bockle can afford to be so certain of the ultimate basis of man's obligation in God's claim. In fact, he does not appear to recognise the major problems of talking about God's claims or rights. He is more concerned in the section from which the quotation has been lifted to harmonise human dependence on God with human autonomy. Bockle does not really follow up the question of God's claims as such. It is fairly clear that he transfers as soon as possible to the correlative language of obligation, a wise move indeed,

but of little help in the analysis of what 'God's rights' could mean.

What then are the problems of using the language of rights in relation to God? John A. Henley (1986) provides a valuable service to Christian ethics in his discussion of this question. First, he speaks of the way in which talk of God's rights must be analogical. Prescinding from consideration of the putative 'rights' of animals, rights are usually held to be predicable only of persons. Moving from the known to the unknown the question now arises, 'Is God sufficiently like human persons to allow the predication of the language of rights?'. Henley points to the Christian doctrine of the Trinity where the term 'person' is used in a relational sense. The term 'Father' seems to permit some view of God as having rights on the analogy of any earthly father having rights against his children, rights to gratitude and loyalty, for instance (op.cit.,372). It is, however, difficult to know exactly how God's personhood is similar to human personhood, even when it is claimed that God became human in Jesus of Nazareth, who is the perfect image of the Father (Heb.1:3; Col.1:15). The least a Christian would wish to hold, I presume, is that God may be more than what is called a 'person' but certainly not less. (Some theologians have been sceptical about the use of the language of 'person' and 'nature' in relation to God. For instance, R. Panikkar (1973) narrates how at the Vatican Council some African Bishops spoke to him of their sadness that their native languages had no words corresponding to these terms. In reply, Panikkar expressed his admiration for such languages and his regret that he did not know them himself (Panikkar,1973:41).)

If God is in some sense a person how might his 'rights' be categorised? Recalling the distinction between human rights and special moral rights, where does

God fit into that schema? Henley shows that God's 'rights' cannot be like human rights for the simple reason that human rights are defined as those 'one has simply because of who one is and in order to become who one is' (ibid.,372). But God, as understood in traditional theistic terms, cannot change in order to become more or less divine. This is the single most difficult problem relating to the concept of the rights of God. Rights are required by humans because they are weak and because there is a sense in which human dignity can be undermined by the actions of others. People need the protection of rights against one another, but God needs no such protection. He cannot be harmed in any way. (Brian Davies,1982:22-24, argues from traditional theistic premises that God cannot be a moral agent, since this would be to make him a being among other beings; because moral agents are usually said to have duties as well as rights; and because moral agency is generally linked with notions of success and failure in the moral enterprise. Clearly none of these criteria applies to God. Thus, if God has rights, they are not of a type possessed by ordinary moral agents.)

A further reason why the human rights concept cannot apply to God is the fact mentioned earlier, that the notion of equality is built into the doctrine of human rights. Each human person has a similar basic dignity and owes every other person the same respect. However, God is not on equal terms with his creatures, and there are theologians like Brunner who reject out of hand the idea of humans having rights against God.

If God's 'rights' are not of the 'human rights' type, is there any way in which they can be said to be like 'special moral rights'? Henley is equally sceptical of this approach, for 'special rights obtain only between those who share a particular relation, not between all and sundry.' (Henley,1986:372). So it is doubtful whether

the special relationship existing between God and those who accept the gift of faith can provide a basis for the rights of all men and women. Henley holds that 'this right of God exists only in relation to those whom in biblical terms he has chosen and this is not yet everyone.' (ibid.). There is some point to this argument, since special moral rights tend to apply only to people who voluntarily enter into a relationship with some other person, and this is simply not the case in a world which often voluntarily rejects the existence of God.

However, it is arguable that some special moral rights arise without bilateral agreement. The relationship between parents and their offspring is a case in point. Children do not 'consent' to be born and to enter into a normative relationship with their parents, but it is common to hold that children as they grow up must respect, to some degree, their parents' rights. Analogously, it may be argued that all human beings are de facto God's children or God's creatures and that God has rights against them even if they do not recognise the existence of such rights. It must be remembered that rights can exist without any immediate hope of their exercise. Perhaps in the present world with its large proportion of non-believers in God, his 'rights' against such people are 'manifesto rights' in Feinberg's sense? Nevertheless, if one is interested in a universal respect for human rights in practice, it seems that giving them a theological foundation must fail from the start, given the wide disagreement on even the basic question of God's existence. This does not mean, however, that a theological foundation is impossible. In any case, even if it is accepted that God's 'rights' are more like special moral rights than human rights, one is still left with the fundamental problem of coping with the consequences of failure to respect God's 'rights' - is God harmed by the failure of His creation to obey him and give him his due? My conclusion is that talk of God's

'rights' is so divorced from the usual meaning of rights-language as applied to human persons, that such a usage is of very little, or no, help in Christian ethics.

C 'Rights' Against God

Is there more sense in talking of the rights of men and women against God in spite of worries about maintaining God's sovereignty? At first sight there does seem some sense to this notion, since rights are important for human beings in basic relationships they have with any powerful figure who can exercise some control over their lives. And surely God's omnipotence together with his interest in human life suggests that humans need some assurance that God will respect their freedom?

Thus, there are theologians who want to speak of the rights persons hold against God. Albert Knudson, for instance, takes Brunner to task for his criticisms of the doctrine of natural rights from a theological point of view, for saying that rights have no place in the Christian ethic of love, and that all the goods of life are gifts of God's grace, not rights. To this Knudson responds:

> But if this be true in an absolute sense, there is no moral order. Duties vanish as well as rights. The only way in which the idea of a moral universe can be maintained is by ascribing moral responsibility to God and a limited independence to man. As Creator of the world, God is a responsible being, and we his creatures have rights over against him as well as duties to him. The failure to see this is due to a one-sided and exaggerated conception of divine grace, a conception that is excluded by the fact of human freedom (Knudson,n.d..:180).

Likewise, Christopher Wright (1979) refers to human rights against God in the context of scriptural examples. He thinks that 'the Exodus was a 'declaration of right'

inasmuch as Israel had a right to be redeemed' (Wright,1979:18). And he goes on to say:

> For God had, in his sovereign freedom, chosen to make himself responsible for Israel. In his covenant with Abraham, God not only undertook a responsibility towards Abraham in the form of a promise, he also bound himself to himself, as it were (ibid.,18).

Clearly the mention of a binding promise here implies that God has created a situation in which a special moral right comes into being with the covenant. God's sovereignty remains, since he is the dominant partner.

The major disadvantage in speaking of rights against God, and one which I think is insuperable, is mentioned by Joseph Allen in an article in the Journal of Religious Ethics (1974). He asks what could rights against God mean in practice? Can people claim long life, or health, or comfort? All that can be claimed, according to Allen, is what God has promised - steadfast love. But is this really significant?

> But of what use is that claim? Of no use against God, because it is his nature to love, and we cannot conceive (from the standpoint of Christian faith) of circumstances in which we might ever have to assert that right, that is, of any instance when the promise would not be kept (Allen,1974:131).

The notion of claiming against God makes no sense, since the language of rights only fits a world where persons live under the shadow of ignorance and selfishness. Human beings need rights against others because of the general moral weakness of the whole race, which makes human living so vulnerable. But God is never a threat to personal welfare and flourishing, as fellow human beings can be.

The discussion so far has been designed to underline the difficulties of speaking analogously about rights in

relation to God. It is exceedingly difficult to know how the language of rights can be applied strictly in this area when the differences between God and humanity are noted. It appears that the very features of human life which make the language of rights essential are not features of God's life as he has been traditionally conceived. I shall leave to others the possibility of applying the language of rights to God from less traditional perspectives.

4.5 Grounding Rights in Human Dignity

While accepting that respect for human rights in practice does not require a theological justification, but essentially natural law reasons which are open to all men and women who have reached the age of moral discernment, I am still interested in the question of theological foundations for the language of rights. I feel that there are particularly distinctive religious justifying reasons which derive from Christian tradition which change the content of respect for rights for the believer. Having rejected the approach which tries to derive human rights from God's rights, I now wish to explore what I believe is a more favourable approach, namely, that God gives rights to human beings against one another because of his providential care for his children, whether they believe in him or not. This allows for the protection of human dignity and also refuses to attack God's sovereignty.

The first point I can make is that God creates a world in which conflict is possible and in which that conflict is actualised by human freedom. And what interests me most in this context is the issue of moral conflict arising from human selfishness and pride. Though God does not will human sin, he does allow sin to occur with all its bad consequences, near and remote. But Christian revelation speaks of a God who in a sense 'responds' to

human disobedience and alienation, through the grace of forgiveness and through moral and religious guidance in the 'old law' and the 'new law'.

Alan Falconer (1980) expresses the manner in which God uses conflict, with reference to the work of Andre Dumas (1978) on political theology:

> In his analysis of the Old and New Testaments, Andre Dumas in Political Theology and the Life of the Church, sees a recurrent pattern of conflict in the events recorded - a conflict which arises primarily because of the differences between individuals and groups. Such conflict possessed then, as it does now, both destructive and creative elements. It is particularly in the creative element of conflict that God is seen active. In such conflicts, God appears as the 'Disturber' or 'praesentia explosiva' (Falconer,1980:212; Dumas,1978;Chs.2&4).

Thus, the concept of conflict is ambiguous from the Christian point of view. It appears that creative conflict is a valuable aspect of human becoming and human dignity. Falconer locates this creative conflict in the necessary self-assertion each individual needs to develop in order to flourish as a unique being (op.cit.,199ff). One's own self-assertiveness naturally comes up against the assertiveness of others in positive and negative ways, and the positive ways are an expression of this creative conflict. The language of rights can be understood as part of this creative conflict, a response to oppressive and negative conflict as found in the selfish assertiveness which is injustice. The creative conflict revealed in particular in the power to claim against others is God's gift and task to those who often seem trapped in the web of destructive conflict. Thus, Falconer sums up the argument so far:

> Human rights emerge as attempts to regulate the conflict between human beings or groups of human beings in such a way as to protect the individual or group and also in such a way as to enable human

> beings and groups to grow to maturity. Human rights reflect, then, and engage the two effects of conflict,viz. the destructive and the constructive or creative (ibid.,201).

What is most interesting in Falconer's analysis above is the positive function given to rights in bringing about human maturity. Respect for rights in human life is not just a defensive need, though this is important as 'protection' against oppression (destructive conflict); it is also a positive, personal need with regard to 'enablement' (creative conflict) directed towards the attainment of maturity. Though Falconer does not stress the function of claiming as much as I would like, it seems to me that the 'enablement' mentioned above must include the capacity to claim for oneself basic goods necessary for personal flourishing. But such claiming itself entails struggle insofar as it is part of the process of maturation. Falconer does not say that the way in which rights regulate the conflict between human beings will be painless. I assume there will often be a difficulty in achieving a proper balance between creative and destructive conflict. It is only realistic to admit, as I have done in the third chapter, that rights-claims can themselves be morally jarring, contributing to the destructive conflict they are meant to overcome. However, such dangers must not be used to obscure the central point that without some conflict there can be no truly human life.

The position just enunciated is not Feinberg's position on claiming in another guise, though it bears a close enough relationship to his approach. The specifically theological colour involves the idea of God as 'Disturber' and as 'praesentia explosiva'. How does this disturbing presence of God make itself felt through the language of rights? One answer must be that God disturbs the powerful of this world through the claims of the weaker members of the human race. This is one of the

major insights of current theology of liberation, which refuses to accept a fatalistic approach to suffering arising from injustice. This form of theology seeks to enable the poor of the world to recognise their obligation to claim in God's name against oppressive forces. According to this vision, it is better to be crucified in the process of claiming basic rights than to be crucified in cowardly silence (cf. Leonardo and Clodovis Boff,1984:2-3; Bonino,1980:27-29; Latin American Bishops (Puebla),1980:48-49).

I believe that Falconer was influenced in his reference to God as 'Disturber' by the writing of David Jenkins (1982) who tends to see rights as a weapon in 'God's warfare on behalf of men and women created in his image and as part of his judgment on the inhumanities of societies and institutions, including those of the Church.' (Jenkins,1982:99). Jenkins refers to an earlier article on the subject of rights in which he says that human rights are related to 'the divine attack, or the human attack under divine inspiration, on the obstacles to becoming human.' (ibid.,99;cf.Jenkins,1974). If this position is valid, then it sheds a further light on the question of the moral content of rights. Here is an essential justifying reason for the Christian who wishes to understand in a deeper way why respect for rights is important.

Allen, who has been mentioned already in relation to his critique of talk of rights against God, is quite prepared to accept that rights are God-given:

> The right that corresponds to God's promise, along with the rights that correspond to the structure he has bestowed upon us in creation, reflects, from a Christian point of view, what is essential to true humanity. Therefore, whether because it is God's command, or because it is right to affirm one's true humanity, such fundamental rights need to be vindicated when they are brought under attack (Allen,1974:131-132).

The clear implication here is that rights, far from being an attempt to undermine God's sovereignty, are in fact a significant expression of respect for God's sovereignty over creation. This point is stressed as follows:

> To speak of rights in these relationships, though, is not at all to compromise God's sovereignty, but to express it, because the rights that reflect what it is truly to be a person and therein a child of God are the expression of how God in his sovereign will has bound himself in steadfast love toward his creatures. The Christian understanding of God and man, far from being contradictory to the concept of moral rights belonging to persons, is inseparably connected with it (ibid.,132).

All that has been said so far in this section can be brought under the general heading of respect for human dignity. In Christian ethics it is extremely common to express this dignity in terms of humanity being created in God's image. A number of theologians mention this link between rights, dignity and the image of God in humankind (e.g. Moltmann,1980:194; Jenkins,1982:99; Bonino,1980:26; Blank,1979:27; Carroll,1987:148ff.; Aubert,1986:142-143).

Now talk of human dignity and of humanity being a reflection of God's own life sounds highly impressive at a general level; it is when one tries to pin this kind of language down that difficulties begin to arise. James Childress (1986) summarises some of the controversies surrounding this concept in his article on the subject in the New Dictionary of Christian Ethics (1986:292-293). For instance, there is the basic question of how far the image of God in humankind has been damaged by original sin. Reformation theology tends to underline the essential damage done to the image itself, while Roman Catholic theology has tended to distinguish between a basic image which remains untouched and an added quality of grace which is lost in the Fall (sometimes this is based on a distinction found as early as Irenaeus between the 'image' and the 'likeness' of God in humanity.).

However, it is again dangerous to speak of a unified 'Protestant' approach to this question, since Childress points out how Lutherans and Calvinists interpret the effects of original sin on humankind differently. Lutherans talk in terms of loss of the image; Calvinists in terms of corruption, not loss, of the image.

The other major issue is that of locating the image of God in some distinctive feature of human nature. Childress has this to say:

> Although the image of God is often construed as reason and free will, it has also been interpreted as spiritual capacities, such as self-transcendence or the capacity for and the call to relationship with God, and as excellences, such as righteousness (ibid.,292).

Either approach mentioned in this quotation gives rise to embarrassing problems in grounding human dignity on this concept of image. If image is related to reason and free will, then there are the problems of grounding the dignity of humans lacking these capacities - embryos, young children, the severely retarded, the comatose, the demented. On the other hand, if the image of God in humanity is dependent on a person's actual response to others in spiritual and moral relationships, then as well as the same problems with the categories just mentioned, one may also have problems maintaining the dignity of solitary persons, those suffering from psychopathic and sociopathic disorders, and persons who make a radically self-centred fundamental option. If the image of God in man and woman is dependent on one's moral record in terms of responsibility to others, then it seems likely that the image of God will come and go, grow stronger and weaker in the course of daily life.

(Linking image with moral rectitude is found in Ramsey,1950:354, 'When man ceases to reflect the image of

God and begins simply to reflect upon himself and his own rights, he is no longer in the image of God.' But if rights are based on the dignity related to image, do human rights disappear when the image does?) Thus, the question remains: 'Is such a concept of a varying and changing image able to ground human dignity?

In order to surmount these problems I feel it is necessary to make some important distinctions, between 'absolute' and 'relative' dignity and between 'intrinsic' and 'extrinsic' worth.

Beginning with the notion of 'relative dignity', I think that this is connected with what is sometimes called humanity's distinctive endowment (cf. Mill,1861:187; Downie & Telfer,1980:39). In effect this includes both approaches to the image concept mentioned above by Childress. Human beings differ from the rest of nature in their possession of reason, free will, and the ability to relate to others in a remarkably intimate manner. This is a general rule applying to the majority of human beings, but there are of course the exceptions to this rule referred to already, those who do not have reason and free will and perhaps little ability to have intimate relationships with others. Moreover, the distinctive endowment of most people in the majority group is always fragile. Persons may suddenly begin to suffer from depression, neurosis and psychosis, which obstruct the life of reason and the intimate relationships painfully constructed over the years. Senile dementia may set in, or a stroke may occur, or a brain haemorrhage experienced, which change the subject's personality in dramatic fashion. It should be recognised by now why I speak about 'relative dignity', because it is based on such a fragile set of qualities and characteristics.

I believe that human relative dignity is the same as

human extrinsic worth. Both concepts function at the level of basic evaluation of quality of life judgements. For the most part, persons are valued because of the ways in which they participate in the distinctive endowment mentioned. When a person is living to the full, this ordinarily means that he or she is acting reasonably, in control of personal life as far as possible, enjoying intimate relationships, and a host of other goods which require some use of reason and imagination. When the distinctive endowment which allows for such a participation in the good life is in danger or at risk, often frantic attempts are made to rescue it. If it is lost, persons become more dependent on others, and often feel 'less a person' depending on the loss of quality of life experienced. Some persons may even feel that life is no longer worth living and thus seek a 'final solution' to their seemingly 'pathetic' state. In other words, once one's distinctive endowment as a human is undermined, there is the temptation to think that one's dignity is also undermined.

However, there are the further concepts of 'absolute dignity' and 'intrinsic worth' which operate at a deeper level than distinctive endowment, and which can lead people to a positive evaluation of human life which appears to have lost all 'quality' as this is usually understood. This approach I cannot see as being reasonable other than in a religious context. It makes sense only in terms of the value which God places on His creation.

This declaration will become clearer, I hope, by means of the distinction between divine love and human love. For this purpose I shall refer to the interesting treatment of this distinction by the theologian James Burtchaell in his book Living with Grace (1973). Here Burtchaell contrasts divine love and human love:

> The Father's love embodied in Jesus is characteristically different from our natural human way of loving. As a man, I am drawn to love various things and persons. I love the Oregon coast at sunset, Brandenburg concertos, asparagus, and my eight grade teacher. No matter how one cares to name these reactions - savouring, loving, liking, desiring, appreciating - there is a common dynamic in them all. I am attracted by certain qualities in these other persons and things, qualities which willy-nilly I find congenial and appealing (Burtchaell,1973:20).

Having described natural human loving, the other side of the contrast is then presented:

> Unlike ourselves, the Father loves men, not for what he finds in them, but for what lies within himself. It is not because men are good that he loves them, nor only good men that he loves. It is because he is so unutterably good that he loves all men, good and evil. He loves sinners. He loves the loveless, the unloving, the unlovable. He does not detect what is congenial, appealing, attractive, and respond to it with his favor. Indeed, he does not respond at all. The Father is a source. He does not react; he initiates love. His is motiveless love, radiating forth eternally (ibid.,21).

The contrast between these kinds of love reveals the distinction between 'relative' and 'absolute' dignity. Human loving requires something attractive in order to respond positively, it requires what has been called distinctive endowment. When this fades, it becomes more difficult to love others. However, divine love does not respond to distinctive endowment, it simply loves whatever it brings forth. 'Absolute dignity' is the value which God places on human life in the very act of bringing that life into existence. The particular talents and endowments are a precious gift of God to humanity but are not God's reason for loving the human race. Thus, God's creative love is the basis of the absolute dignity which persons possess even when they lose everything that makes life seem worthwhile in the eyes of the world.

Now respect for rights must be related to the concept of 'relative dignity'. Rights protect the goods which make up what is called 'a good quality of life'. Rights do not relate directly to the concept of 'absolute dignity' since that depends on God's love which cannot change or be undermined by any human action. In other words, the evil that men and women do can injure human 'relative dignity' or 'extrinsic worth', but cannot injure human 'absolute dignity' or 'intrinsic worth'. However, I must not give the impression that 'relative dignity' is unimportant theologically. Although I must not love God's gifts to the exclusion of God Himself, part of loving God must involve an appreciation of his gifts of reason, free will, the ability to relate to others, and all that these imply. I cannot afford to be indifferent to the content of relative dignity, since that is part of God's image in my life. God's gifts cannot be separated totally from his nature. Moreover, given Burtchaell's analysis of human loving, it appears that if I wish to begin to love God and my fellow humans I must find something attractive in them. So human love must approach God and his creation in terms of the beauty which attracts the heart. From here I should try to ready myself for the kind of love which remains steadfast when the beauty of creation is absent, when 'relative dignity' fades.

Respect for rights, then, may be seen as a first step in arriving at an approach which transcends ordinary human loving. Unless I have the memory of God's love in his gifts of distinctive endowment and the beauty of creation in general, I shall find it extremely difficult, if not impossible, to take the leap of faith in grasping (even in the weak way open to humanity when strained to its uttermost limit) the reality of absolute dignity. Rights function in protecting relative dignity so that the memory of God's attractiveness remains in mind, and so that I may experience something of the absolute safety

mentioned earlier.

If rights are to be grounded theologically on the notion of image as the basis of human dignity, they must be understood in the light of the two aspects mentioned above. Humanity is made in God's image means on one level that the mere act of existing is a reflection of God's love as absolute source. Human life is of value before one takes into account all the wonderful things humans can do through the further gift of God. Secondly, at the other level, human life reflects the life of God in the sheer attractiveness of human experience when God's gifts are taken seriously and enjoyed. Rights function at this second level, protecting that image of God in men and women which is most fragile and temporary.

4.6 Conclusion

This chapter began with an attempt to chart briefly the course of the language of rights from 'hostile waters', so to speak, to the 'safe harbour' of Christian respectability. This course has not been altogether smooth, as seen in the reluctance to accept the conflict which must arise quite often when rights are claimed. An underlying political conservatism, especially in Roman Catholicism, has often appeared to fail in going beyond the rhetoric of claiming rights, for fear of political violence and anarchy. The risks associated with claiming are only reluctantly embraced by the Church. However, there is some evidence that the Christian Church has moved from a position where she was concerned mainly with her own rights against what seemed a hostile world. As Moltmann puts it, 'the church cannot wait with its protest until its own religious freedom is threatened. It is there for the sake of man and must raise its voice for the rights of man.' (Moltmann,1980:184).

Although the language of rights has become respectable in Church circles and is used frequently in 'official' statements, there is still relatively little attention being paid to the careful analysis of this language. Thus, Henley rightly refers to 'the naivety with which some theologians and church leaders concerned about human rights have understood the relation between theoria and praxis.' And the upshot of this, he claims, is that 'the cause of human rights has been virtually taken for granted in certain circles, especially those of the World Council of Churches, and little critical attention has been paid to such matters as its foundations.' (Henley,1986:367).

I have tried to pay some more attention to the question of theological foundations for rights-language in this chapter, but first I attempted to clarify the issue of the distinctiveness of Christian ethics. Basically I discussed two related issues: the meaning of the 'content' of morality and the distinction between 'motives' and 'reasons'. I argued that a sharp distinction should not be made between 'act-evaluation' and 'agent-evaluation' as happens when motives are categorised under the heading of 'agent evaluation'. What is more important is to examine the justifying reasons which motivate (or should motivate) an agent to act. These reasons are central to the content of morality. They always refer to the goods or values to be realised in the action.

For Christians, there will be natural law reasons for pursuing certain goals and these will be shared with all men and women of good will. In fact, Christians cannot eliminate such reasons, with their basic reference to human benefit and harm, from their moral deliberations. However, the beliefs of Christians based on revelation give more profound justifying reasons for acting which draw out the deeper meaning of the natural law reasons.

To respect the rights of others, for instance, because they are made in God's image (however that is to be interpreted) is closer to the ultimate truth about human life and its value than any secular reason.

Thus, I have spoken of the advantage within Christianity of having both 'fundamental' and 'ultimate' reasons for acting, in which the natural law aspects are fundamental, though the religious justifying reasons are ultimate. In my opinion, religious belief relating to the doctrines of creation and redemption capture the 'fundamental' value of human life in an 'ultimate' way. Those who do not share in such beliefs can hold the fundamental values, but will not understand their ultimate value. Such a distinction, I believe, makes a difference to the 'content' of morality.

Having shown that Christian ethics is distinctive in content because of the specific justifying reasons which should motivate the believer, I then went on to show some wrong avenues of approach to the question of theological foundations for the language of rights. I rejected the notion of God having rights, and the notion of humanity having rights against God. It is better to say that human rights are willed by God, given by him. C.J.Wright states clearly, 'What God demands of me to do for B constitutes B's rights.' and 'Rights do not exist apart from the demand of God upon someone.' (Wright,1979:9).

God supports the efforts of men and women to respect rights as part of the project of arriving at human maturity, through achieving a balance between creative and destructive conflict. A more dramatic way of expressing this point is to say that rights are part of God's warfare against all that would undermine humanity's dignity. This includes the destructive conflict just mentioned. Thus, the language of rights as used by men and women can be a sign of God the 'Disturber' at work on

earth refusing to allow his creation to return to chaos, and confounding the strong through the claims of the weak.

I then pointed out the difficulties in speaking of human dignity and the related theological term 'image of God'. I thought it necessary to distinguish between the image of God as the ground of humanity's 'absolute dignity' and also as the ground of humanity's 'relative dignity'. The former is based on God's love of humankind as seen in the very fact of their existence. The latter is based on the quality of life which God enables men and women to develop, what I have also called human 'distinctive endowment'. The language of rights pertains directly to the category of 'relative dignity' where the image of God can wax or wane depending on the circumstances. However, it pertains to the category of 'absolute dignity' indirectly, insofar as human loving needs some appreciation of quality of life, if it is to accept that life as worthwhile when goods or values are removed. Needless to say, the leap from recognition of 'relative dignity' to 'absolute dignity' depends on a special illumination or grace from God in conjunction with the human response of joy in relation to the fragile gifts bestowed on humanity, a joy which is protected to some extent by the reality of claiming rights.

I trust that this material will be sufficient to support my earlier arguments against scepticism concerning rights. There are many other issues which, unfortunately, I could not treat of in this chapter. For instance, the arguments of Moltmann and Henley (op. cit.) which underline the eschatological nature of rights could not be discussed. Nor could I deal with the attempts to locate the language of rights in Scripture. Wright makes a valiant effort to do just this, but I am sceptical of this whole operation (cf.Limburg,1979; Blank,1979; Bonino,1980; Ahern,1984). Much more could be said about

'relative dignity' and the values which contribute to it. These goods can be 'Revelation-Faith' experiences leading persons to a fundamental grasp of the manner in which all life, but especially human life, is in the grasp of a gracious God (cf. Shea,1980:chs 1&2). I could go even further and speculate that participation in certain goods given by God can be part of the process of the deification of the human person.

Enough has been said in this and preceding chapters to dispel some of the fears one might have in regard to the use of the language of rights. But it still remains to be seen how this theoretical part can be applied in practice. Therefore, I move now to the second part of my thesis, where I attempt to show the usefulness of the language of rights as applied in the area of human reproduction.

Part 2:

Application to the Sphere of Reproductive Rights

To me, having a baby inside me is the only time I'm really alive. I know I can make something, do something, no matter what color my skin is, and what names people call me. When the baby gets born I see him, and he's full of life, or she is; and I think to myself that it ~~that~~ ~~it~~ doesn't make any difference what happens later, at least now we've got a chance, or the baby does.

The words of a black mother from Robert Coles, Children of Crisis, cited by A.Dyck,Hastings Center Report, 1973, p.75.

Can it be said that some individuals and couples have a basic "need" for children, the frustration of which would seriously harm their very humanity? This does not seem plausible.....it would be highly questionable to place such an uncertain and variable need among those universal human needs which,....,give rise to moral claims and obligations.

Choices in Childlessness,(1979),(Report of the Free Church Federal Council and the British Council of Churches), p.22.

Chapter 5:

The Basic Analysis of Reproductive Rights

5.1 Introduction

From the first chapter of this thesis I described rights as valid claims or entitlements to something regarded as good or valuable and against someone, the person or persons with some correlative obligation. The Benefit or Interest theory of rights stressed the good, value, or interest which justifies placing the 'burden' of a duty on others. The Choice theory, though partially discredited, has some importance in its stress on the power that right-holders have over the normative relationship entailed by the possession of the right.

Therefore, the analysis of all particular rights, including reproductive rights, must concentrate on two specific areas: the good or value that is claimed and the relation between the claim and the duty or to personalise this - the relation between the right-holder and the duty-bearer. All other questions must be related to these basic issues. For instance, conflicts between rights can exist because goods can be in conflict and because human relationships centring on such goods can conflict.

In this chapter I want to mention briefly the central issues that need to be faced if any sense is to be made of 'reproductive rights'. These include the goods involved in having children or founding a family; the question of the identity of right-holders and duty-bearers, i.e. who has the right to reproduce and who has the respective duty to respect that right?; the question of conflicting interests and rights; and the basic ways in which my analysis of the Hohfeldian distinctions might apply to the sphere of reproductive freedom.

5.2 Reproductive Values

That human reproduction involves some important values or goods can hardly be denied; the problem is to decide on the relative importance of these. Stanley Hauerwas (1981) claims that there is often confusion in people's minds regarding the reasons for having children or founding a family. He says that he begins his college course on marriage and the family with questions such as 'What is it?' and 'Why would anyone want to do it?'. Such questions puzzle his students who tend to join the course thinking of it as a "how to do it" option (Hauerwas,1981:157). He feels that the answer to his fundamental question tends to be unsatisfactory:

> "What reason would you give why one should be willing to have children?" They say "children are fun," or "as an expression of a couple's love," or "because it is just the thing to do," but they clearly doubt that any of these are an adequate basis for having children. Their often unexpressed doubt seems to me to illustrate the depth of the crisis concerning the family: we lack a moral account of why we commit ourselves to having children (ibid.,157).

Keeping in mind that it is justifying reasons which are central here, what are the reasons for wanting to procreate? John Bowlby (1965) mentions cases where illegitimate girls grow up to have illegitimate children themselves. Often the reasons for this happening are negative from the moral point of view. 'Running side by side with the need to use the baby as a weapon against the parents was the need to use it as a weapon against themselves', as a result of 'profound feelings of guilt' (Bowlby,1965:113-114). Obviously not all reasons for conceiving and bearing babies are morally justifying reasons.

John Finnis (1980) gives two basic justifying reasons for having children. One is the value of life itself,

which includes bodily and mental health. The other value realised in human procreation is 'sociability', which includes the intimacy between husband and wife and their offspring. The two values are associated with distinguishable desires, according to Finnis:

> We can distinguish the desire and decision to have a child, simply for the sake of bearing a child, from the desire and decision to cherish and to educate the child. The former desire and decision is a pursuit of the good of life, in this case life-in-its-transmission; the latter desires and decisions are aspects of the pursuit of the distinct basic values of sociability (or friendship) and truth (truth-in-its-communication), running alongside the continued pursuit of the value of life that is involved in simply keeping the child alive and well until it can fend for itself (Finnis,1980:87).

Finnis's reference to the distinction between the desire to procreate and the desire to cherish and educate children is important, because it brings up the question of the scope of reproductive rights. One can distinguish the 'typical' cases from the 'less typical'. The common experience of humanity is the holding together of the two desires mentioned by Finnis. Most people want to cherish the children they procreate, at least when that child is a child of a loving relationship. One should note here the pain of many unmarried mothers when it comes to give up their babies for adoption.

But there are the less typical cases as well, most obvious being the recent trend in commercial surrogacy, where the intention from the beginning is to give the child to the commissioning couple. Arguably, this practice could give rise to reproductive claims which limit the scope of reproductive freedom to the experience of pregnancy and birth. But there is also the matter of reproductive rights in cases of pregnancy happening from rape. Since the conception was involuntary, what kind of rights are involved here? If the woman decides on an

abortion, is this the exercise of a reproductive right or of a right to health and general self-determination? If the woman decides to give birth to the child, is this an exercise of the mother's reproductive right, or should one concentrate on the 'rights' of the fetus, or is there a combination of rights here? Because my own approach stresses that reproductive rights are essentially special moral rights arising from voluntary decisions to found a family, I find it difficult to see pregnancy through rape as open to the application of such rights. (I have decided not to discuss the issue of methods of childbirth in this thesis, though there is obviously some connection between them and reproductive freedom, cf. Huntingford,1985.)

Much time could be spent drawing out the details of these basic goods of life and sociability (not to mention the communication of truth); here I shall make just a few points.

First, procreation is a distinct aspect of the good of life as such. Usually the main aspect of the pursuit of this good is the maintenance and promotion of existing life, my own life and the lives of others. However, by life is meant not mere bodily and physical existence, but truly 'human' life. The existence and health of body and mind are the basic substratum necessary for participation in basic personal goods, e.g. those mentioned by Finnis: knowledge, play, sociability, aesthetic experience, religion, and so forth (op.cit.,chs III & IV). Now the good of procreation is associated with the continuation of truly human life beyond my own individual enjoyment of these basic goods. In other words, there is a form of altruism in wanting human goods to be enjoyed, when my own enjoyment of them has come to an end. This is not to deny, of course, the deep-seated human need to 'live on' after death (cf.Dyck,1973:75). Perhaps the birth of children can be seen as a vicarious existence after

death. Note that the Christian can, and must, share in the desire that human goods be experienced by others after her death, as long as God wills his creation to last; though vicarious immortality in one's children should be replaced by a desire for a personal share in God's eternity.

Second, the basic good of human sociability is of course wider than the shared joy of a man and woman bringing their child into the world, but human procreation is arguably one of the fundamental expressions of sociability. Interestingly, Finnis appears to situate procreation in relation to this good at the level of giving a home to children or raising a family. He speaks above of the distinctive desire 'to cherish and to educate the child'. So, while the good of life can in one sense be satisfied simply in conceiving and giving birth to a child, the good of sociability would appear to require an ongoing sharing of parental resources, especially love and truth, with the child. However, it must be admitted that Finnis, in the quote given above, insists that the ordinary care parents show for their children in keeping them alive is an expression of the good of life. Clearly the fact that a man and a woman bring a new life into the world can be a binding factor. The child can be the focus of an intimate relationship. But it must be remembered that caring for a child begotten by another couple can still contribute to the good of sociability in binding together the adoptive parents. The relationship between the distinct desires is both complex and controversial.

So far I have concentrated on justifying reasons for having children, assuming all along that the primary role of reproductive rights is to protect persons in the fulfilment of their desire to have children. I firmly believe that this is the primary focus of reproductive rights. But I have to recognise that a secondary aspect

of these rights is concerned with reproductive freedom in a wider sense. Another way of expressing this is to argue that reproductive rights are an aspect of a more basic right, the right of self-determination. In the reproductive sphere this right involves the freedom not to procreate as well as the right to procreate. The freedom not to have children itself has various aspects. It may refer to a basic vocational decision not to marry, and if one makes marriage a precondition of the possibility of using one's reproductive capacity, this entails a decision not to have children. Another aspect might involve the separation of vocational decisions, such that two persons agree to marry but on principle refuse to have children. And, most obvious of all, the sphere of reproductive freedom extends to the spacing of children within the dynamic of the marriage relationship.

This emphasis on self-determination as the essential feature of reproductive rights is exemplified in the attitude of Sheila McLean (1986) of Glasgow University:

> Merely not interfering with existing capacities admittedly permits reproduction, but does not tackle the fundamental issue. Is the production of offspring the overriding moral good which demands the protection of the terminology of human rights? Might not the debate equally focus on the individual's right to self-determination, which - whilst still acknowledging an inherent value in freedom from intervention and the importance of reproduction or parenting - none the less also depends on freedom of choice? To adopt such a perspective can expand our consideration of reproduction and ultimately render any right more meaningful (McLean,1986:100).

The notion of self-determination is of great importance, I agree, but the question remains how far this applies in the reproductive sphere? McLean tends to be quite radically individualistic, to the extent of being in favour of the rights of single persons to have children (ibid.,1986:110). Christian ethics naturally

frowns on this approach to self-determination, and tends to stress instead the freedom of the married couple to determine the size and spacing of their children (cf. The Vatican's Charter of the Rights of the Family,1983, Article 3). There are, of course, well known differences of opinion among Christians concerning the scope of this freedom and the means used to realise it.

Most of the justifying reasons for having children mentioned so far have been of the 'natural law' type, i.e. reasons recognisable independently of God's revelation in Scripture. But there are also specifically religious reasons which can be added to the natural law ones. Often these reasons offer a greater depth to the already existing secular reasoning, and again it must be noted that I am not claiming that religious reasons eliminate the importance of the secular or natural law reasons.

In first place, one can value the procreation of children and the promotion of family life because in this way the community of the Church is built up. In other words, procreation is not simply about self-preservation, the 'selfish gene' reproducing itself; nor is it simply about the survival of the human species as a good in itself; nor is it simply about continued participation of humanity in certain general goods; it is also about the preservation and promotion of the life of the Christian community with its special story. In this light one can understand why Finnis wished to include the good of 'truth-in-its-communication' (Finnis,1980:87) as a justifying reason for having children and experiencing family life. Bringing children into the world seems to involve the duty to share with them what one conscientiously believes to be truly good, and this includes cultural and religious traditions. Children of Christian families are not born as citizens of the world with a generalised religious belief, but into a partic-

ular culture, nation, and religious tradition. Thus, Hauerwas insists that, within Christianity, marriage and family life are not just natural habits, 'the usual thing to do'. The Christian religion has made marriage and family life a vocation, and one with a strong community dimension:

> The family is not just something we do because we are in the habit, nor is it something we must do to fulfil a moral purpose. Rather marriage and the family, like the life of singleness, becomes a vocation for the upbuilding of a particular kind of community (Hauerwas,1981:174).

In second place, the good of procreation and family life has an important association with God's nature as Trinity. Thus, Cathal B. Daly, the Roman Catholic bishop of Down and Connor, wrote in 1962 a criticism of the works of Glanville Williams and Joseph Fletcher, which included the view that their advocacy of artificial insemination was an attack on the very notion of God, his Fatherhood:

> God Himself could find no better name to express His Being and His creating and loving relation to mankind than the human name of Father. Who strikes at human fatherhood strikes at God.
>
> ...[It is] from the idea and self-revelation of God that we learn what human fatherhood should be. God's is the fatherhood of whom all fatherhood in heaven and on earth is named (Daly,1962:124).

Use of the terminology of 'Father' and 'Son' does not imply that God's nature involves sexual differentiation. As Michael Schmaus (1966) reminds his readers: 'If we use the word Father, we use it to express creativeness, and we mean by it the Generator, Guardian and Preserver of life.' (Schmaus,1966:184). So emphasis on God's Fatherhood is not a sexist approach to theology. Indeed, in relation to procreation both human parents share equally in the image of God as generators, guardians, and

preservers of new life. Thus, I might just as easily have referred to the 'Motherhood' of God, since women are partners in the origin of new life. The point at issue here concerns the extent to which human procreation at its best reflects the dynamism of God's nature, both as 'immanent' and 'economic' Trinity (cf.Rahner,1970; McBrien,1980:357ff. 'A proper theological and pastoral understanding of the Trinity depends upon our perception of the identity between the so-called "economic Trinity" and the so-called "immanent Trinity."'). Procreation is an image of the immanent Trinity in so far as the love of a couple reflects the traditional processions of the divine persons - Son from the Father, and Spirit from Father and Son (cf.Jordan,1970:ch 9, entitled 'Procreation as Divine Immanence') .

Although parents bring a unique individual into existence, that individual is flesh of their flesh and is (ideally) an expression of their intimate love. But procreation is also an image of the economic Trinity, the Trinity as it goes outside of itself in creation and in the assumption of the human nature of the Word. In giving birth to children parents are taken out of themselves in the recognition that the new being is different from them, though intimately related to them. Thus, just as God can be seen in himself with regard to the trinitarian relations and for others with regard to creation and incarnation, so human parenthood can be seen in terms of the relationship between spouses which is enriched by procreative love and also in terms of the relationship of love between parents and the new individual. In each case a change of focus shows the richness of reproductive reality, especially when seen in a Christian light. Jean Vanier (1985) summarises the argument above as he declares that:

> In the Christian vision of sexuality, man and woman render present the mystery of the Trinity. Our God

> is not a solitary God; he is one God in three persons. In fecundity, there is also a trinitarian mystery (Vanier,1985:142).

One should be able to recognise from what has been said above the relationship between procreation and 'relative dignity'. Human beings have 'absolute dignity' quite apart from anything they do, as I have said already; but 'relative dignity' depends on free participation in basic goods. Being able to see procreative love as a sharing in God's creative power and also as a revelation (weak and analogical as it is) of God's nature must contribute greatly to the Christian couple's self-respect and to their faith in the goodness of human reality.

It has not been my task in this section to order the various justifying reasons according to their relative importance. Instead, I have tried to mention just a few of the reasons why procreation is such a good that it can be the object of a right. Some of these reasons are shared by all reflective individuals quite independent of religious belief, whilst other reasons depend on religious belief to guide individuals and couples. The next issue in need of analysis is the nomination of the right-holders in this sphere of reproductive freedom.

5.3 The Right-Holders

The right to reproduce is regarded as a human right by the United Nations Declaration, when in Article 16.1 it states that 'men and women of full age...have the right to marry and found a family'. Now not all of the rights human beings have are human rights in the strict sense, and to make matters more complicated, the scope of human rights is somewhat controversial. I mentioned earlier the views of Wellman, McCloskey and Raphael on this question. Human rights are said to be universal,

possessed by every human being in virtue of his or her basic humanity. They are not based on differentiation among persons with regard to age, sex, race or religion. (In passing one should note the difficulty here of reconciling 'human rights' with the category of so-called 'womens' rights' claimed by feminists. The two categories cannot be identified because human rights do not differentiate on the grounds of sex. But neither can one categorise the rights of women as such under special moral rights. I am not sure how to deal with this concept.)

Is there not something contradictory then in the U.N. Declaration above when it speaks of 'men and women of full age'? Does this not qualify the universality of human rights in the sphere of reproduction? I think the answer here must involve the distinction already made between 'having' a right and 'exercising' a right. The Declaration must be thinking of the power to actually exercise the right to have children, and this of course is only possible for men and women of full age (though even this may have to be qualified in reference to the mentally retarded where chronological age often lags behind basic human maturity). What then of the other half of the distinction? Can persons have a right to reproduce without the possibility (physically) of exercising the right? I think that it is possible to speak of the reproductive rights of young children before puberty. The reason for this is that actions may occur which would damage the exercise of reproductive rights at a later stage. Conceivably certain medical treatments or lack of such might damage a person's reproductive capacity in childhood.

Or children may be brought up by their parents or guardians with a distorted view of sexuality and procreation, with the result that a 'normal' sexual relationship within marriage is made extremely difficult

or impossible. Some cases of alleged 'infertility' in adult life may be due to negative parental attitudes to sexuality adopted perhaps unconsciously (cf. Philipp,1975:ch 12 'Psychology and Infertility'). Thus, it makes some sense to state that those entrusted with raising children respect the reproductive rights of their offspring by imparting to them a healthy outlook on sexuality as part of the basis of family life.

Mention should be made here of the issue underlined in parenthesis above, namely, the question of reproductive rights of the mentally retarded. This will be discussed in greater detail in chapter 7. Here, however, I will say that being of 'full age' chronologically does not automatically entitle a person to found a family. In fact, in some cases of severe retardation the age of the person has little relevance; what matters is the ability of the person to understand and enjoy the good being claimed. Where such an ability to participate in the good of reproduction is absent, one has to ask about the potential to develop this participation, and if this is low or non-existent, then a real question mark hangs over talk of reproductive rights for persons in this category.

Rights are said to protect individual interests against encroachment by other individuals, and especially the state (cf. Wellman,1978:55-56); they are also said to be 'trumps' against utilitarian reasoning which would sacrifice individual welfare for the sake of group welfare (Dworkin,1984:153). But are reproductive rights of this individual kind?

Sheila McLean, looking at the U.N. Declaration's Article 16 and the European Convention on Human Rights (1952, Article 12), suggests that the emphasis here is not on individual rights at all because of the link between procreation and marriage and the family.

> What is significant about both of these declarations is that they do not per se make reference to, or provide for, an individual right to reproduce. Rather they seem to protect only the rights of those who are married (and those who, by implication, are capable of legally entering into this state). The individual as such is not protected by this: merely the nuclear family, which is 'the natural and fundamental group unit of society and is entitled to protection by society and the State' [reference is to U.N. Declaration, Article,16,(3)], is accorded special status (McLean,1986:113).

Leon Kass (1985) also underlines this ambiguity regarding the possession of a right to reproduce, in the context of a discussion of infertility and 'Making Babies'. He says: 'But the right to procreate is an ambiguous right, and certainly not an unqualified one. Whose right is it, a woman's or a couple's?' (Kass,1985:44ff.) I think the more traditional view of the value of procreation, both secular and religious, tends in the direction of the right of the couple to have children or to found a family. However, this approach may present some difficulties for the language of rights with its individual emphasis. One way around the problem could be to regard the average married (or co-habiting) couple as an individual person with rights against others (perhaps on the analogy of a business company or some group being a 'legal person'). This would work, I think, where the individuals within the relationship are of one mind in planning their reproductive freedom. It would be problematic, however, in cases where the partners differed in their desires regarding children and family size.

An interesting point in relation to the preceding discussion concerns the common distinction made already in this work between 'human rights' and 'special moral rights'. If one considers reproductive rights as primarily predicable of couples instead of as individuals against relative strangers, then the right to have

children appears to be a special moral right as well as a human right. In fact, it might be expressed in this way: men and women have (normally) a human right to enter into a relationship within which they have the special moral right to procreate. If this is acceptable, then the primary categorisation of reproductive rights must be as special moral rights, not as human rights. A human right is a right against the state and/or everyone else (depending on one's point of view). But no person can claim the right against another person to provide him or her with a child, unless that other person is willing to enter into such a relationship (and which, for Christians at least, must involve a wider sharing of life than merely bearing and raising a child). The human right in this matter is the claim-right against others and the state not to interfere unduly in the power to freely enter such relationships, as well as not interfering without serious justification in procreative decisions within such relationships. (I make the right to procreate essentially a special moral right between partners in marriage, and only secondarily a right against the state to provide maternity services, simply because the primary element in founding a family is the production of gametes by the couple and their sexual relationship which involves mutual donation of these sex-cells. The contribution of the state is secondary in the majority of cases to what the spouses do for each other.)

Where infertility is involved, however, the right-duty relationship may change because of the special need of couples at the primary level of gamete production and conception.) The special moral right to procreate is primarily against the person with whom one enters a relationship in which it is understood (promised, perhaps) that having children will be attempted as part of the relationship.

It will have been recognised at this stage that the

various aspects of the analysis of reproductive rights are closely related and overlapping. Once one has mentioned the underlying goods or values which are the objects of rights, it is natural to move on to consider the persons who are in a position to enjoy these goods. And then, since rights are both claims to goods and claims against others regarding those same goods, the next aspect of analysis must be the identification of the duty-bearers, those against whom the rights are held.

5.4 The Correlative Duty-Bearers

The distinction between human rights and special moral rights concerns both right-holders and duty-bearers. I mentioned earlier the difficulties some philosophers have with the notion of a universal right possessed by everyone against everyone else. How can my right to life (a basic human right if ever there was one) be held against everyone in the world, when I shall encounter only a small minority of the world's population in my life-span? The answer, I suppose, is that the scope of the right is exaggerated for the purpose of stressing the value of human security. Thus, the negative right not to be attacked by anyone gives a basic security precisely because it takes into account so many hypothetical eventualities. Remember too that D.D.Raphael distinguished between 'strong' and 'weak' senses of human right, with the weak sense referring to a more limited right against the state (cf. Raphael,1965:216-217). Special moral rights, on the other hand, have a more limited scope in terms of the relationship between right-holder and duty-bearer. Marriage is an example of such a relationship.

If reproductive rights are human rights in the strong sense, then they are held by individuals or couples against everyone else in the world. But how significant

is this? Can I expect strangers from a foreign land to support my reproductive freedom? It seems doubtful whether my human rights here give rise to a strict positive duty in the lives of individual citizens of India or Australia. However, some argument may be made for the existence of duties of beneficence or charity, especially in the provision of maternity services and family planning guidance for Third World countries. Whether developing countries have a strict right to such help is a moot point, and will be taken up again in my chapter on population control.

If reproductive rights are human rights in the weak sense, then they are held against the state and possibly one's whole society. By the 'state' I mean government and its health and social services; and I include 'society' insofar as the population of a particular country are responsible for the government elected. Thus, if reproductive rights are regarded as important by society and the state fails to respect such rights in practice, then there would appear to be a duty on the part of citizens to complain to their elected representatives, and ultimately to vote out a government which does not protect such important values. These rights, though called 'weak' are in fact, paradoxically, the strongest protection one can have, precisely because of the growing dependency on the state in the sphere of reproduction. Individuals and couples require more than state non-interference in order to promote reproductive freedom, very often they need positive help from the State; services for the infertile provide an obvious example of this.

If reproductive rights are primarily special moral rights, then they are held by those who voluntarily enter into an intimate relationship with a view to having a child or children. Within the more traditional world-view this has meant that the primary right is that of each

spouse against the other in possession of the correlative duties. How strict the right of each partner against the other is is itself a matter of some controversy. Even within Christianity there are some who hold that procreation is an optional part of the marriage relationship, and thus that the right of the spouses in this matter is purely discretionary (cf. Free Church Federal Council & British Council of Churches,(1982) Choices in Childlessness:12,52). The more traditional view of all the churches, and still the official teaching of Roman Catholicism, is that procreation is a mandatory right of married couples, that is, a coincidence of duty to procreate and right to procreate. (This duty and right refers to normal couples who are not in danger of having severely handicapped children and who can afford to raise offspring. Cf. Ford & Kelly,1963:434, for 'excusing reasons' for not having children.) In cases where the special moral right to procreate is held by the couple to be discretionary, both may wish to waive their rights to found a family. In cases where the right to procreate is regarded as mandatory, the spouses may feel that they have no permission to waive the right against one another. Thus, in the former case the other partner is released from his or her duty, whilst in the latter case both partners are held to their strict duty.

It may be objected that the introduction of a weak sense of human right has undermined the distinction between human rights and special moral rights, since the citizens' relationship with the state and its services involves special moral rights. Does not the state 'promise' to care for the health of its citizens, even to the extent of providing free or subsidised medical services for the vast majority of society. There is a point to this objection, I agree, but I think that the category of special moral rights should be kept for more intimate and more specific relationships. In relation to reproductive freedom, for instance, it is doubtful

whether the state's promise to care for the health of its citizens is specific enough to correspond to a strict right to infertility services in every region. Both because of the scarcity of resources and the controversial nature of some alleged reproductive rights, the duty of the state is not always easy to pin down. However, there is a sense in which individual citizens enter into strict normative relationships with representatives of the health services, e.g. doctors, and the special moral rights arising here can include reproductive rights. (It is partly because of the special normative relationships between medical staff and their patients that the former can be so disillusioned with the lack of state support for the specific area of care they are trying to provide. Because the demands on the state are so many and so varied, it is difficult to include the relationship between it and individual patients in the category of special moral rights.) Further controversy arises when one includes among reproductive rights permission to enter into special normative relationships with gamete and embryo donors and with surrogate mothers.

5.5 Goods/Rights in Conflict

The actual exercise of rights is obstructed not merely by those who ignore their duties and are deliberately unjust, but also by those who argue that some right-claim is either invalid to start with, or that it is only a prima facie right which in this instance is overridden by some other right to some equally important or more important good. In this section I wish to mention some of the possible conflicts which might qualify reproductive claims.

I mentioned in the section on the justifying reasons for having children Finnis's reliance on two particular goods or values - life and sociability. However, while it

is true that human procreation can be an expression of these goods, it is not difficult to see that these goods involve other aspects which procreation may damage or obstruct. For instance, even though the situations are relatively rare today, child-birth can be a danger to the life of the mother. And if one includes health in general under the value of life, a wide interpretation of mental health (as in the practice of the Abortion Act in England) may introduce a conflict of goods and rights in many cases. The point at issue here is the fact that at times one cannot enjoy together all the goods or values that are usually claimed as rights. If a doctor informs a woman that becoming pregnant and having a child may damage her physical and/or mental health, it is difficult to see how she can claim both rights (i.e. the right to have a child and the right to good health) at the same time. At least one of the goods must be sacrificed (cf. G.J.Hughes,1978:54-56, on the subject of 'incompossible wants').

The good of life is also the basis for the enjoyment of other goods to which there are rights. Although it can be said that procreation is at the service of life and is a creative act, obviously becoming pregnant, having children and raising them, involves the sacrifice of other goods which childless individuals can enjoy. Thus some rights may have to be waived in order to enjoy the right to reproduce. The right to work, for instance, may have to be limited towards the end of pregnancy.

With regard to the good of sociability, it is possible that having children may damage relationships instead of cementing them. For instance, some strain may be felt in the relationship between husband and wife, especially if the pregnancy is unplanned. Worries may arise concerning the resources present to raise the new family member in an appropriate manner. And if other children exist, the birth of another brother or sister may upset the delicate

equilibrium of family life. Special problems arise in this area if it is known that the child in the womb is handicapped, physically or mentally. Then parents may wonder if they have a right to bring the child to birth, taking into account the rights of already existing children and the partners' own rights against each other. It is of course highly controversial whether embryos and fetuses within the womb have strict rights to be born. The moves towards 'wrongful life' cases in American courts would seem to suggest the existence of a 'right not to be born' (cf. Liu,1987:69-73; Steinbock,1986:15-20; Feinberg,1974:180).

Some philosophers today are willing to refer to the rights of future generations. Feinberg, for instance, considers that the influence the present generation has on the basic interests of future generations provides a justification for speaking of their rights. He agrees that future generations have a more remote "potential" than fetuses in the womb, 'but our collective posterity is just as certain to come into existence "in the normal course of events" as is any given fetus in its mother's womb.'(1974:181).

Often concern for the interests of future generations centres on ecological issues, and the duty of presently existing people not to ruin the environment for their descendants. But it may also be argued that the reproductive rights of the present generation must be limited by the rights of future generations not to inherit certain genetic defects. This eugenic type argument can of course lead to different strategies. On one hand, it might lead to curtailment of the rights to reproduce of the sections of the population likely to produce children with inherited and inheritable defects, by either voluntary, involuntary, or non-voluntary contraception, sterilisation and abortion. On the other hand, the rights of future generations in this area might

be better served by investing in the study of genetic defects with the aim of ridding the gene pool of deleterious genes.

I am not convinced of the value of using the language of rights to refer to the interests of future generations. My main reason for this scepticism is not that future persons cannot claim for themselves - neither can embryos or young children, yet I would argue for the possibility of their having some basic rights - but that future persons simply do not exist. And the fact that there is a great probability that persons will exist in the future does not move me from this position. The danger in talking about the 'rights' of future persons or generations is that one bases this on a picture or image which makes one imagine that such persons already exist in relation to the present generation. Because what is done now by people may influence their grandchildren, and because they live to see the effects of their present actions on these grandchildren when they come into existence many years hence, does not mean that those children have rights at this moment against 'their grandparents'. They may have some right to criticise the actions of their grandparents and their generation when they come to maturity, but they have no strict rights before they were conceived. I think it would be odd to argue that my rights to a nuclear free world (assuming for the moment that the nuclear revolution has had more bad effects than good effects on human life) were violated before I was conceived by the scientists who developed the atom bomb or by the politicians who applied their discoveries in destructive ways.

This is not to say that the present generation has no normative relationship to future generations, only that it is not of the kind that involves strict rights and correlative duties. I believe that there is a duty to consider the interests of future persons when acting in

certain ways which will affect their eventual welfare, but this is not strictly a duty to future persons; it is instead a duty concerning persons who will probably exist (cf. the distinction made by McCloskey (1965) between 'duties to' and 'duties concerning'). Another position here would be to invoke the argument made earlier, namely, that the correlativity between duties and rights is not as strong as that between rights and duties. Thus, it could be the case that the present generation has some duties to future generations without these duties entailing rights. However, my own opinion is that, from the point of view of rights-language, future persons are in the same category as animals and paintings - their interests (and in the case of works of art, their value), though important, are not as important as those of existing persons. Thus, there are duties concerning them but no duties to them. The normative relationship between present and future generations is much weaker than that between members of the presently existing generation.

There is also the argument that some of the present trend in introducing technology to reproduction, for all its good intentions, in fact sets a trend which will bind future generations, just as so many of this century's technological innovations take away or reduce human choice (cf. Walter,1985:26-27 for a description of how luxuries become needs and how needs then remove freedom and make one dependent). Either way, what is done today with the intention of respecting reproductive freedom will affect the interests of future generations for better or for worse. All moral agents should take such interests into account when making moral judgements, even though I feel it is better not to construct rights from the interests of future persons. The next section will discuss briefly how the more technical distinctions in rights-language might be used to elucidate discussions of reproductive rights.

5.6 The Hohfeldian Distinctions

I think it appropriate at this stage of the discussion, just before returning to the technical language of rights, to make a brief comment on the relationship between rights and justice. Clearly the two concepts are closely related, but what exactly is this relation? I am impressed by Hollenbach's answer to the question:

> The entire theory of rights is developed within the framework of a complementary theory of justice. Rights represent claims to those things which are due individuals. The notion of justice is an indispensable means in the process of judging which of these claims takes priority over others in situations of conflict. The language of rights, therefore, focuses on the dignity, liberty and needs of all persons in society regarded disjunctively or one at a time. The language of justice, on the other hand, focuses on the dignity, liberty and needs of all persons regarded conjunctively or as bound by obligations and duties to one another (Hollenbach,1979:144).

Two points stand out here in particular. First, the different focus of rights and justice should be noted: the former on what individuals can claim for themselves in the protection and promotion of their individuality; the latter on the need for individuals to recognise that rights can be in conflict and that there are duties to respect the rights of other individuals as well as claiming their own. Second, theories of justice attempt to harmonise the conflict between rights in order to be fair to all.

When one examines the traditional types of justice, especially the distributive and commutative forms, one recognises how justice attempts to be fair to individuals while taking into account the common good. Hollenbach defines commutative justice as being 'concerned with the relationships which bind individual to individual in the sphere of private transactions' (Hollenbach,1979:145).

Thus, there is a sphere of life which is relatively private and intimate, and where the principle of subsidiarity demands that the state allow the maximum freedom in line with the common good. Distributive justice and social justice operate at a wider level, and are defined by Hollenbach as follows:

> Distributive justice determines how public social goods are to be allocated to individuals or groups. Conversely, social justice specifies how the activities of individuals and groups are to be aggregated so that they converge to create the social good (Hollenbach, 1979:145).

It should be clear, however, that these types of justice are meant to be complementary and overlapping. If commutative justice is to flourish, for instance, 'public social goods' need to be distributed fairly; for instance, if patients are to have a satisfactory relationship in commutative justice with their doctors and nurses, there must be a prior emphasis on distributive justice in the provision of facilities for training medical staff and maintaining high standards. And for this to occur, presumably there has to be a system of taxation and thus a limit on what individuals can do with their personal resources. Or, to take another example, if people want the freedom to enter into satisfactory contracts with others, they need to cooperate with the legal and political system which regulates business affairs for the protection of society.

Problems begin to arise, of course, when commutative justice and distributive and social justice conflict, either when individuals resent contributing to the common good, or when the state intervenes unfairly in personal relationships in the name of the 'common good' (Consider, for instance, two contemporary and opposing theories of distributive justice in Rawls,1973 and Nozick,1974).

Obviously these issues apply in the sphere of reproductive rights, especially in view of the distinction between human rights and special moral rights. Special moral rights in particular seem to be closely related to commutative justice, and I have stressed the requirements of the marriage agreement (call it a contract or a covenant if one will) with regard to the decision to procreate or not. But insofar as procreation is also linked with health (a basic human right), and health requires for its protection more resources than an individual can provide - the birth of children, ante-natal and post-natal care, and above all treatment for the infertile - one seems to require a strong expression of distributive justice and social justice if reproductive rights in the full sense are to be respected. In other words, reproductive rights are respected in the context of justice when there is a balance between the state's respect for the rights of individual couples to have children and the couple's readiness to consider the resources needed from the state in order to support their rights.

Thus, there has to be a kind of 'give and take' regarding commutative and distributive justice. The state has to respect the individual couple's right to found a family in security, whilst each couple must be ready to accept that the state has other duties to fulfil as well as providing support for reproductive rights. This last point may mean that couples have to make sacrifices at times by limiting family size, and it may mean as well that couples should be willing to contribute what they can to help other couples to procreate, e.g by paying their taxes, or by lobbying for the direction of more funds into infertility treatment.

The particular claims, liberties, powers and immunities possessed by people involves substantive moral issues, in which are debated questions of the relative

importance of the goods desired and the normative relationships between the parties concerned. In general, however, one can say that claims are the strongest kinds of rights, giving rise to strict duties of aid or non-interference. Liberties are less strong in their binding force, giving less protection than strict claims and leaving much of the pursuit of the desired good to personal effort. Powers and immunities have different strengths according to the circumstances, and are specifically related to the maintenance or change of relationships. Let me give some applications of these concepts within an assumed moral theory, say, Roman Catholic orthodoxy on procreation.

The freedom to have children according to Roman Catholicism demands as a precondition entry into the married state. Now, deciding to be married involves a basic human right. It is also a claim-right. This right entails a basic protection from being obstructed in entering into a committed relationship with a person of the opposite sex. In normal circumstances the state cannot forbid marriage, and society has no right to criticise the decision to marry. The right is basically negative, a right to non-interference. But it is arguable that some positive right against the state and society exists to recognise the importance of marriage as an institution and to frame legislation to uphold that institution for those who freely choose it.

Though the right to marry is a human right and a claim-right, it is also a liberty-right in relation to potential partners. No one has a strict claim against particular members of the opposite sex to enter into marriage. Each person is free to get married or not. As with the single way of life, a liberty-right means 'no duty not to do X'.

Because the decision to marry involves a relationship

bound by special moral rights, neither the state nor society (nor the Church for that matter) have the power-right to make marriage a duty. They cannot, without the permission and consent of individuals, change their relationship as relative strangers to that of intimate lovers. Hence, each individual has an immunity-right against powerful institutions like the ones mentioned not to be forced into marriage. (This assumes the truth of what might be called the 'modern romantic view of marriage', a view held mainly in the Western world. One must recognise differing views about the freedom to marry and to choose a partner in other parts of the world (cf.Prickett,1985, for accounts of traditions of marriage and family life in different world faiths). Here again I must reiterate that the application of the Hohfeldian distinctions depends on the ways values are recognised and ranked in importance in different societies. Getting married may be a liberty in some places and a duty in other places.

Within the marriage relationship, then, the partners have a general claim against each other not to exclude procreation from their relationship, except for serious reasons. (Traditional Roman Catholic doctrine spoke of two ends of marriage. They are mentioned as follows by P.Adnes (1966) '_In matrimonio, finis primarius "operis" est procreatio atque educatio prolis, finis autem secundarius mutuum adjutorium.'cf. Codex iuris canonici, (1917), 1013,# 1. Since Vatican 11, this terminology of a hierarchy of ends is no longer in vogue, and there is a preference for the view that the goods of marriage are of equal importance and inseparable, cf. _Gaudium et spes_ (1965),Articles 47-52 (cf.Flannery,1975:949-957), and the present _Code of Canon Law_ (1983),1055,#1.,cf.English translation, Canon Law Society of Great Britain and Ireland). But in practice they have a liberty-right to procreate and space the arrival of their children (Vatican _Charter of the Rights of the Family_ (1983),

Article 3, 'The spouses have the inalienable right to found a family and to decide on the spacing of births and the number of children to be born..'). The Church may expect a couple to have children in time, but its teaching cannot lay down detailed guidelines as to when procreation should take place and the number of children the couple should ideally have.

The special moral rights arising from marriage involve the power-right of the spouses to become parents by procreation. In other words, marriage creates an initial relationship of intimacy between a man and woman, and provides for the possibility of initiating a new relationship whereby husband and wife become father and mother. Moreover, this power-right is exercised every time the couple decide to procreate, and a child is born to their union. With each new child the couple become parents to a new individual. They have the right in certain circumstances to change their relationship further in this way. By implication, the couple have immunity-rights against any person or institution that would force them to have children against their will, since this would involve an illicit attempt to change their relationship.

When a couple suffer the effects of infertility, the question of rights enters in relation to the means used to circumvent this. In the teaching of the Roman Catholic magisterium a couple have no claim to use illicit means to overcome infertility. (Such teaching has been explicit in Roman Catholicism certainly since Pius X11, but has been decisively stated recently in the Congregation for the Doctrine of the Faith's Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation, (1987).) There is no liberty-right either, since there is a duty to respect other rights. For instance, there is the claim-right of each partner to procreation through 'normal' sexual intercourse, not

through artificial insemination, even by husband. There is also the claim-right of each spouse not to allow a third party to contribute gametes to the process of procreation. In the case of in vitro fertilisation, there is the whole question of the claim-right to life of embryos to consider. Because of these strong claim-rights, official Roman Catholic teaching cannot speak of power-rights to become parents by such means. Also each spouse has an immunity-right against the other partner not to be pressurised into becoming a parent in one of these ways.

Obviously many of these positions regarding the practical application of types of rights are controversial. I mention these particular positions in order to show how the Hohfeldian distinctions might be used within a particular moral system. Other moral systems will disagree with the Roman Catholic Church's way of associating goods, and especially with the particular special moral rights accorded by the spouses to each other within marriage. The language of rights can be used clearly by opposing moral systems and provides a method of seeing where the differences of approach lie.

5.7 Conclusion

I am aware of the summary nature of this chapter and of the relative shallowness of the treatment given to the various aspects of the analysis of reproductive rights. But then this chapter is meant only as an introduction to further chapters which present what I think are major moral and legal issues involved in reproductive freedom. To have gone into greater detail in this chapter would have made for an unwieldy introduction and would have encroached on the material of the final chapters of the thesis.

The complexity of the different aspects involved in the analysis of reproductive rights must be obvious from the initial pages of the chapter. Examination of the reasons for having children, for instance, reveals both justifying reasons of different kinds as well as explanatory reasons which do not justify having children. Often it seems that people do not consider in a conscious way the reasons for founding a family. For many, it is simply 'the natural thing to do', a response to some instinct or perhaps to social conditioning (or a mixture of both). From a more analytical point of view, I suggested that the basic goods of life and sociability act as justifying reasons in general for having children. These are fundamental natural law reasons. But mention was made also of specific Christian reasons, related to the continuation of the Church and its story of salvation. More speculatively, there is the relationship between procreation and the life of God in the Trinity. As God the Father is the origin of all life, human parenthood is an image of God's creative love. And since human procreation at its best is a free and conscious act, it reflects God's activity better than the instinctive responses of the animal kingdom.

Later in the chapter I discussed the related issue of conflict between goods which can give rise to conflict of rights. Since procreation is only one aspect of the goods of life and sociability and may interfere in the participation in the other aspects, great care has to be shown in harmonising the right to procreate with the other rights related to these goods. Most obvious here is the relationship between husband and wife and between parents and their existing children. Arguably, the special moral rights of marriage mean that husband and wife must think of the health of their own intimate relationship before many other goods. Also reproductive rights entail a duty to raise children in an appropriate way. A decision to have another child when it is not

possible to give it proper care may be immoral, even though I would prefer not to speak here of the future person's 'rights'. Clearly, existing children have interests which must be considered, if one holds that reproductive rights generally carry over into the right to raise children.

Concerning the correlativity of rights and duties, I underlined the special moral problems arising with regard to the nomination of right-holders and duty-bearers. The primary issue regarding right-holders of reproductive rights is whether rights are possessed by individuals as such, their being part of the wider right of self-determination, or whether they are possessed by individuals as part of a relationship which gives rise to special moral rights. The mainline Christian view tends toward the latter position. But there are all sorts of complications here, especially with regard to claims made by homosexual and lesbian 'couples', issues which I cannot deal with in this work.

The nomination of duty-bearers also presents some difficulty, due in large part to problems mentioned earlier concerning the analysis of human rights and special moral rights. The strong sense of human rights entails universal duties, i.e. duties on the part of every moral agent in the world, though these duties will be hypothetical in many cases. The weak sense of human rights limits duties to the state and its organs. Since human rights in the weak sense involve both positive and negative duties, while human rights in the strong sense are usually of the negative type, the former are often more beneficial from the practical point of view. So it is important to agree on the role of the state in 'supporting' reproductive freedom.

Regarding the notion that reproductive rights are special moral rights, I focussed especially on the duties

of the partners in marriage, duties which tend to arise from what most Christians at least will say is part of the essence of marriage. The idea that healthy married couples can simply decide in principle not to found a family with children of their own will appear scandalous to many. In other words, there is a widespread intuition that the right to found a family is not totally discretionary. But special moral rights in the reproductive sphere may also arise between couples and their doctors, in such a way that the distinction between human rights (in the weak sense) and special moral rights gets blurred. More controversially, there may be a question of special moral rights giving rise to mutual duties between donors of gametes and surrogate mothers and the recipients and commissioning parents.

In the remaining four chapters of this thesis I intend to take up and develop some of the analytical aspects raised in this introductory chapter. Clearly, I must continue to involve myself in substantive moral issues or normative ethics. I cannot avoid making personal judgements, but such judgements are relatively unimportant in the context of my methodological interests in this work. What is primary is the description of the issues involved in some controversial reproductive claims, showing the possible rights involved, the kinds of conflict that may arise, and trying to discern the potential right-holders and duty-bearers. Moreover I am concerned with the way in which the technical distinctions made within the language of rights can clarify positions which are then open to casuistic reasoning. Naturally, too, I am interested in presenting more of a Christian orientation to these questions.

Chapter 6

Reproductive Rights and Population Control

6.1 Introduction

Much of the modern emphasis relating to reproductive freedom centres on the technology applied to human infertility. More and more people, in the developed world at least, are now aware of the plight of infertile couples and sympathise with their efforts to found a family. The last two chapters of this thesis will consider some of the problems related to the language of rights in this area. But in this present chapter I am concerned with the particular issue of the decision to space the arrival of children within the context of the couple's relationship. As seen already, this is often said to be part of the general right of self-determination. Couples can and must make decisions on the number of occasions that they will become parents, since each new child of theirs implies the initiation of a new parental relationship of responsibility.

Though it is my opinion that the primary aspect of reproductive rights is the positive one of having children, the secondary aspect of limiting family size in order to fulfil duties to existing children, the other spouse, and to society and the state (insofar as procreation may call on considerable resources from the community), must not be ignored. Clearly, the situation regarding the optimum size of family for the realisation of respect for all the rights and duties entailed by procreation will vary from place to place. In this chapter I am aware of problems of underpopulation in some parts of the world, but I tend to concentrate on issues related to overpopulation. Whatever the reasons are that inspire couples in the less developed countries of the world to have large families, the central question is

'Are there sound justifying reasons for claiming the right against state and society to procreate at will?'. Or looked at from the other angle, the question then is 'Are there sound justifying reasons for the state and society to attempt to limit the rights of couples to decide on the size of family they want or feel they need?'

The answers to such questions depend, I think, on finding out whether the freedom to have large families, when actualised, damages important goods which are the object of conflicting rights. Hence the emphasis in what follows on the connection between population growth and world hunger. This chapter, then, applies the language of rights to a key issue of conflict regarding essential human welfare.

6.2 Locating the Major Issues

A. Population Trends

My previous chapter introduced the concept of the right to have children in general. But this general right requires more specific study, and in this chapter I concentrate on a specific aspect of reproductive choice, namely, family size. In particular, I shall dwell on the possibility of tension which may occur when personal choices relating to family size conflict with the needs of a larger group, a church, a cultural group such as a nation, or the world community at large. Obviously I am assuming that personal choices with regard to procreation can have effects which go far beyond satisfying the needs and wants of individuals and family groupings. And since these decisions of individual couples touch on the welfare of others, there is a need to face the question of whether and to what degree reproductive freedom may have to be curtailed.

Let me now attempt to specify what I mean when I say that family size is an issue of key importance in the discussion of reproductive rights. Note that I am not talking in first place about individual decisions taken separately. I am interested in general trends within a certain group and area. One or two couples deciding to have either a very small family or a very large family do not affect the average family size, but where such decisions become a trend the influence on the wider society can be significant. It may be useful to examine this point in relation to the situation of 'underpopulation' in many of the more developed nations.

In an article in The Scotsman, Peter Lyth (1985) writes on the problem of population in West Germany, a country with one of the lowest birth rates in the world (Lyth,I985:8;cf.Clare,1986:91ff. for a discussion of similar problems in Hungary.). Lyth describes the situation as follows:

> The fall in the birth rate started, as in many Western countries, with the introduction of the pill in the I960s, but in West Germany the trend became extreme. Since I974 the birth rate has been exceeded by the death rate, in other words, the total population has been declining. Lately the Germans have acquired the distinction of having the lowest birth rate in the world, at less than ten births per I,000 inhabitants per year.(I985:8)

Lyth goes on to speak about the worries this low birth rate is causing politicians in particular. For instance, the Minister of Defence, Manfred Woerner, has extended the length of national service for young Germans from I5 to I8 months. 'The accent for the future seems to be: fewer people will have to carry a greater load.' According to Lyth, things have changed greatly since the I930s when 'Hitler tried to encourage German women to have more children by giving them medals called "The Honour Cross of German Motherhood" (bronze for four chil-

dren, silver for six, gold for more than eight). So the choices of individual couples with regard to procreation have clear effects of a negative kind on the life of the society in which they live.

On the other hand, when people think of population problems they usually think of the alleged crisis of 'overpopulation' in the less developed countries of the world. In fact, this 'problem' of overpopulation may be one of the reasons why couples in the more developed lands decide to limit their family size. Germaine Greer (1985) writes of the example of Doctor Paul Ehrlich, the author of the well known work The Population Bomb (Ehrlich,I971), who, in order to show his sincerity in preaching the doctrine of 'Zero Population Growth', had himself sterilised after the birth of his daughter (Greer,I985:404). But before going on to analyse in more detail the problems relating to overpopulation, it will be useful to recognise at the start the complex of factors which go to make up the whole issue of population control. Some of these factors are brought out by the theologian Charles Curran (1985), following the main trends of Philip Hauser's argument (Curran,I985:234; Hauser,I97I:233-239):

> From my perspective I am inclined to accept the analysis of Philip Hauser that human beings are complex culture-building animals, and the population crisis is really a series of four crises or problems. First, the population explosion maintains that, assuming the present trend, by the year 2000 the population of the developing countries will be about the same or as great as the total population of the world in I960. Second, the population implosion refers to the increasing concentration of people on relatively small portions of the earth's surface, a phenomenon generally known as urbanization. Third, the population displosion means the increasing heterogeneity of people who share the same geographical space as well as the same social, political, and economic conditions and
>
> is exemplified by the current problems in Northern Ireland and many countries in Africa or even in

> Canada. Fourth, the technoplosion refers to the accelerated pace of technological innovation which has characterized our modern era. (Curran,I985:234)

These distinctions reveal some of the complexity of the issues involved in population control. Obviously not all of the distinctions apply directly to family size, but it is not difficult to find some indirect applications. For instance, the so-called 'technoplosion' has had widespread effects on life on this planet, and not just in relation to the quality of human life; indeed, technological innovation has had a clear effect on procreative choice from its effect on the death rate (and especially the infant mortality rate) to birth control techniques.

Regarding the question of population implosion or urbanization, one can consider the question whether change of location from rural background to city life leads to a 'culture-shock', whereby previously held values, including decisions with regard to family size, are abandoned under the pressure of new circumstances. Clearly, too, the reality of population displosion with its problems of heterogeneity of population, can have an effect on procreative choice. For instance there may be an incentive to have more children for fear that another rival group may swamp one's own group due to its growing social and political dominance. In the past, in places like Northern Ireland, some Protestants felt fear and apprehension in the face of the trend among Catholic couples to have large families, and that fear included the worry that a minority group would soon develop a greater status in society, with accompanying demands for greater political participation. It will be good to keep these distinctions in mind as I move on to discuss in more detail the question of population explosion.

B. The 'Population Explosion'

From the preceding discussion on the complexity of the problems involved in population control in general, it will come as little surprise that the specific issue of population growth, gives rise to many controversial expositions of the 'facts', and arguments concerning both causes and possible solutions of the 'problems'.

Firstly, if it is assumed for the moment that there is a population explosion in some parts of the world, it still cannot be assumed that this is necessarily bad and to be discouraged. Indeed, there is some evidence to suggest that rapidly growing population may be a boon to some of the developing countries. For instance, Donald Warwick cites the example of Argentina, where in I974 the Health ministry restricted the sale of contraceptive pills as part of an effort to increase the population to 50 million by the end of this century (Warwick,I974:2). In the mid-I970s, Brazil too was unconcerned to a great extent with decreasing the population growth rate because of the economic boom it was experiencing at the time (cf. Nelson,1980:42ff. for a description of Brazil's ' "Economic Miracle" '). In fact, in times of economic boom a country may well need more people to take advantage of the opportunities presented by the economic trend. So it seems that population explosion is partly a relative matter depending on the economic resources available at a given time and the distribution of these among the population. In some cases population increase can be a boon, whilst in other situations it is a tragedy.

Secondly, before going on to treat the question of the connection between poverty/hunger and the population explosion, it is important to recognise that even in the wealthier nations of the world there may be what might be called 'selective population explosions'. By this is meant the growth of population among disadvantaged groups

in society. In other words, there is often concern in wealthy nations about the 'irresponsibility' of the procreative choices of the poor. A good example of this reality is to be found in the following words of a poor black American mother in Robert Coles's Children of Crisis (cited by Arthur Dyck,1973):

> The worst of it is that they [the State's social services] try to get you to plan your kids by the year; except they mean by the ten-year plan, one every ten years. The truth is, they don't want you to have any, if they could help it (cf. Dyck,I973: 75-76; Gordon,I977:399-400).

I have already hinted above that the population explosion becomes a 'problem' when the pressure of population imposes conditions of hardship on a group. At its most extreme, the conditions in question amount to starvation and famine. But to say this is to assume what needs to be proved, namely, that overpopulation is a major cause of poverty in less developed countries. It also assumes that the basic terms of the argument are clear, that the criteria which lead to the conclusion that the world is heading towards a crisis in food production are uncontroversial. Both assumptions can be questioned.

Taking the latter assumption first, the basic language used in speaking of 'the Food Crisis' tends to be vague and indeterminate. A warning about this is sounded by N. Eberstadt (1979) in his article 'Myths of the Food Crisis':

> How little we know about the world food problem is frightening. There are really no accurate figures on food production for any poor country; the margin of error in the estimate for India alone could feed or starve twelve million people. Nutritionists' estimates of the "average" daily adult protein requirement have ranged from 20 grams a day to over 120. Perhaps most astonishing, we do not know the world's population within 400 million people. In

> short, we do not know how much food there is, how much food people need, or even how many people there are (Eberstadt,1979:292).

Turning to the first assumption, there is at least another option which might be considered if one is set on seeing at least some connection between hunger and over-population, and that is the thesis which inverts the causal sequence just mentioned above: overpopulation then is seen as an effect of poverty and underdevelopment, already present due to other factors, both natural and human.

If there is to be a sensible discussion of reproductive rights in connection with world hunger, the two considerations just made must be kept in mind. However, of particular importance is the question of what the future holds with regard to possible famine and ecological disaster, and the connection with population trends. In this matter it is vital to study two possible replies to the question just posed. For the sake of simplicity I shall characterise these two approaches as 'Neo-Malthusian' and 'Developmentalist'.

C. What Causes World Hunger?

Concerning the first approach there is a useful summary in the following description from Onora O'Neill (1980):

> Malthusians take their name from Thomas Malthus (1766-1834), who argued as early as 1798, in his Essay on the Principles of Population, that it was necessary to seek voluntary curbs on the rate of population growth because unrestricted population growth would be faster than the growth in food supplies and so lead to famine. Since Malthus's time, more optimistic writers have thought him wrong, because in some countries the rate of economic growth has far out-stripped the rate of growth of population. The average person in the developed countries today is far better off than his

> or her ancestors were in Malthus's day. Neo-Malthusians do not deny that this economic improvement has occurred. But they think it cannot be sustained, and correctly point out that it is in some part due to the smaller size of family now common in the developed world...They characterise population growth as an explosion or a bomb that economic growth cannot defuse (O'Neill,1980:269).

O'Neill of course makes necessary further distinctions between positions held within the Neo-Malthusian camp; for instance, there are some relatively optimistic members who think that population growth can be controlled and brought into line with economic growth. However, others are more pessimistic and do not believe that population control can avert famine. Though no names are mentioned specifically by O'Neill, I presume she has in mind writers such as Paul Ehrlich (1971), William and Paul Paddock (1967), and Garrett Hardin (1974).

O'Neill also gives a useful summary of the Developmentalist position, as follows:

> Developmentalists join with pessimistic neo-Malthusians in their view of attempts to avert famine by controlling population growth. They note that where population growth rates fall this is often <u>after</u> a reasonable level of economic well-being has been reached. For the very poor, children are an asset as well as a liability. Only one's children can provide for old age or sickness or the other disabilities that in wealthier countries (and in planned economies) are covered by social or private insurance schemes....Developmentalists tend to think that there will be no demographic transition in countries with rapidly growing populations until there has been at least some economic growth. Trying to achieve economic growth by limiting population growth is therefore going about the problem in the wrong way. (op.cit.,271)

Among those holding a position of this kind I can mention the names of Arthur Simon (I975), Arthur Dyck (I973), and Jack Nelson (I980).

It is not my main task in this chapter to decide in favour of some particular analysis of the population explosion. I mention these two general views of the relationship between poverty and population because of their relevance to the question of reproductive rights. What is this relevance? The point is this: if it can be established more or less clearly that the earth is either in the midst of, or in the process of moving towards, crisis in the sense of widespread starvation and ecological disaster, and if it can also be established that the major contributing factor is overpopulation, then there exists some justifying reason for controlling population and limiting reproductive rights.

The justification for limiting individual freedom with regard to procreative choice can be argued with reference to the need to respect the common good (which is always the good of the individual in the long-term) taking into account humanity's social nature. Limiting choice in this sphere can also be justified in terms of liberal principles, for instance John Stuart Mill's famous principle: 'That the only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant' (Mill,1861:135). Now, the harm-to-others principle may be difficult to specify in all cases (cf.Lee,I986:Ch.5), but if it is reasonably certain that the harm to be avoided is famine on a large scale, there can hardly be a clearer example of the application of Mill's principle.

D. The Means of Controlling Population

Having established in general that the state, representing society as a whole, may have a right in the face of crisis and disaster to limit the reproductive freedom of its citizens, there is still the need to face

the more specific question of the means used to achieve that end. Note that in the quotation from Mill there is the assumption that people may need to be forced to think of the harm their individual choices and actions inflict on others and that coercion may be required to protect others in society. Applying this to reproductive choices, one can recognise that control of population presents authorities with two main ways of implementing policy - voluntary and involuntary control of family size.

Voluntary control is brought about mainly by means of education in the widest sense. I have in mind here, not just information about family planning, but a general moral education involving a recognition of the conflicting rights occurring when couples have large families which they cannot rear properly. In other words, voluntary control of population implies an appeal to moral conscience of individuals concerning the principle of respect for persons and the need to achieve a balance between the types of justice regulating human interaction.

Involuntary control of population, on the other hand, is more problematic from the moral point of view. Under this heading one needs to consider both positive and negative incentives offered to individuals by the state. On the positive side there are various payments - money, gifts, services - made out to members of the target population to encourage limitation of family size. Then, on the negative side, the incentives vary from economic penalties imposed on those who have more than the average number of children required to maintain zero population growth to compulsory sterilisation and abortion (cf. Henry,1976; Christiansen,1977). One author, Melvin Ketchel, has even suggested putting chemicals in the water supply with the purpose of reducing fertility (Ketchel,I968).

It may be objected that positive incentives offered by the state should not be included under the heading of involuntary control of population; but I have included such incentives in this category because I follow the opinion of those like Arthur Dyck who find both positive and negative incentives in this area 'morally problematic': 'Both positive and negative incentives are morally problematic. Unless they are extremely high they do not effect the relatively wealthy; and at the same time whether high or low are unduly coercive for the poor. Furthermore the effects of incentives are detrimental to children rather than to their parents' (Dyck,I973:78). In other words, all incentives tend to discriminate against the poor and those who have little freedom to say 'No' to what seems to be a bribe (cf.Warwick,1974:2). This is why I have preferred to limit the category of voluntary control, concentrating on moral education with its appeal to respect for persons, for the common good, and depending on more altruistic than prudential motives for limiting births.

Up to this I have centred attention on the policies open to the more optimistic Neo-Malthusians, who hold that population control can be the answer to problems of world famine and poverty in general. But there are also the more pessimistic thinkers - Hardin, for instance - who do not hold out much hope that population control can save the earth from disaster. Instead, more ruthless measures are required. This is how O'Neill summarises Hardin's approach:

> The citizens of affluent countries are like passengers in a lifeboat around which other, desperate, shipwrecked persons are swimming. The people in the lifeboat can help some of those in the water. But if the citizens of affluent countries help some of the starving, this will, unlike many lifeboat rescues, have bad effects. To begin with, according to Hardin, the affluent countries will then have less of a safety margin, like an overladen lifeboat. This alone might be outweighed by the

> added happiness of those who have been rescued. But the longer-run effects are bad for everyone. The rescued will assume that they are secure, will multiply their numbers and so make future rescues impossible. It is better, from a utilitarian point of view, to lose some lives now than to lose more lives later. So no rescue attempt should be made. (O'Neill,I980:275-276)

Hardin insists that if affluent countries keep on pouring aid into poorer countries, the people there will not face up to their own responsibilities to save themselves by reducing their population. So, it seems, the richer countries have to be cruel to be kind. Poor people in the less developed lands must die of famine if the lesson of control is to be learned. It also seems to be the case that any right to aid on the part of poorer countries must be made conditional upon the full co-operation of those nations in limiting drastically population growth.

Another metaphor used to rationalise a means similar to that proposed by Hardin is that of 'triage' advocated by Paddock and Paddock (I967). The world is like a battlefield strewn with wounded soldiers and with few doctors to care for them. Difficult decisions have to be made: the people doomed to die must be abandoned; those lightly wounded can be left to themselves and to nature's own healing; and a further group will be the ones to benefit from scarce resources. Applied to the question of famine and population growth, some nations are beyond help and must be abandoned just as Hardin suggests.

Many arguments can be marshalled against such metaphors. For instance, O'Neill points out in relation to the lifeboat image, that people in the water do not have a clear entitlement to a place in the lifeboat, especially if this would endanger those already in place; however it is not clear that this applies equally to the issue of those suffering the effects of famine. For it is arguable that the poor people of the world do have some

entitlement to survive, especially if hunger and starvation are largely the result of unequal distribution of the earth's resources. Moreover, It may be the case that the affluent nations achieved their affluence partly by the exploitation of the less developed countries, and perhaps this exploitation continues through various forms of neo-colonialism. Thus there might be a right to restitution on the part of the descendants of those colonised and exploited (cf. O'Neill,1986:110, for a discussion of whether the poor nations have a 'special' right against colonial nations. This seems to be a further aspect of the problem of conflict of rights between generations). In other words, searching questions need to be asked about how certain folk got their seats in the lifeboat in the first place. And if their position there is brought into question then a question-mark must be placed against their right to impose ruthless population control on the very nations who have contributed to their comfortable position.

Perhaps the strongest arguments against the lifeboat and triage metaphors come from the opposing Developmentalist position. For one thing, Developmentalists are often less happy in talking about the 'problem' of overpopulation in the same breath as the tragedy of famine and poverty. It's not that they fail to see a connection between the two, but that their position is hostile to the view that the population explosion is the cause of world poverty and famine. They are more likely to see overpopulation as an effect of poverty caused by underdevelopment and uneven development. I shall try to explain these points briefly.

Underdevelopment has to be explained in terms of a complex set of factors, some of which are listed in the following remarks from George Lobo:

> A country can be said to be overpopulated only in a

> relative sense, viz., with reference to the resources actually available to sustain in a decent manner the existent number of people. But the potential resources of the earth are still very immense. The problem is of properly exploiting them and distributing them. Even poor and densely populated countries like those of South Asia could have vastly more than the present population. But not only do the primitive methods of agriculture and industrial production stand in the way, but the outdated and neo-colonial structures positively hinder any progress. (Lobo,I985:205)

Lobo goes on to underline the influence of vested interests (who manipulate political life and control the local bureaucracy) on the economies of these poorer lands (ibid.,205). Nor does Lobo forget the influence of foreign interests, especially multinationals (ibid.:I47-149).

Uneven development is also of importance in explaining the poverty of the developing countries and the population explosion which is thought to follow from it. Arthur Simon expresses the point well:

> Lower death rates, not higher birth rates, are responsible for today's population growth. Poor countries as a whole have actually lowered their birth rates slightly over the past several decades - but death rates have dropped more sharply, and that achievement has touched off the population boom. Advances in medicine and public health, along with increases in food production, account for most gains against early death. (Simon,I975:29)

But what has this to do with poverty in the less developed countries? Simon explains by pointing out that the population explosion actually began in Europe some centuries ago, since it was there that the original improvements in health care and medicine took place. But Europe could cope with the growth in population for two main reasons. First, she experienced an Industrial Revolution which provided employment for the masses. And, second, many countries developed colonies from which they received cheap raw materials (and even cheap labour).

However, in the less developed countries, something different has happened: the medical advances have been introduced to a certain degree such that population growth is greater than the death rate, but there has not been the equivalent development of industry or agriculture to give a decent standard of life to those who live longer. So there arises the strange situation where thinkers like Hardin attempt to argue that the present situation of crisis in developing countries necessitates allowing those who could live longer to die slowly. It seems that what the rich nations give with one hand they take back with the other. This is what is meant by uneven development.

For the Developmentalists in general, then, population growth in itself is not the problem, but a symptom of the real problem - underdevelopment and uneven development. Thus, if drastic measures involving the limitation of the intimate procreative freedom of couples are applied on the basis of a false belief that overpopulation is a cause of world poverty and hunger, then reproductive rights are being violated. It is therefore of primary importance to elicit the facts about world poverty and population growth before any attempt is made to limit the freedom of individuals.

Of course, to state that overpopulation is not <u>the</u> problem is not the same as denying that overpopulation is <u>a</u> problem. After all, symptoms of illness are often painful, requiring treatment in their own right. Thus, as well as working on the development of the poorer countries, some limitation of family size may be a good thing, so long as it is not a cover for dragging one's heels in the sphere of development. Dyck puts the point clearly as follows:

> Compulsion can only be justified as a last resort, where the costs of failing to lower birth rates is

> very high, where alternatives have been tried and failed, and where society combines its population policies with effective efforts to remove gross inequalities in the society. Two or three children is far too precarious a hold on the future for those who live under circumstances where infant mortality rates are high, and where the availability of medical services, education, and jobs is highly uncertain. Indeed, no just population policy is possible within a system of gross social inequalities (Dyck,I973:79).

One should note a couple of points from this quotation. For instance, almost everyone will agree that compulsory population control ought to be the last resort, but the question remains whether the earth is already on the brink of a 'last resort' situation. (There is a question here of whether ordinary moral norms fail to apply in what C.Fried calls 'catastrophic' situations, Fried,1978:10. Fried thinks that, because of the possibility of such extreme situations, the norms of right and wrong are 'categorical' instead of 'absolute',ibid.) Secondly, one must remember that being permitted no more than two or three children seems less of a violation of the right to procreate than being forbidden to procreate in the first place, especially when one takes into account the grave social effects in terms of harm to others which total procreative freedom might permit. Dyck stresses this distinction a good deal in the essay I have been quoting and there appears a lot of good sense in it, unless one places absolute significance on individual freedom.

6.3 The Application of the Hohfeldian Distinctions.

A. Types of Justice

Before I move on to consider these distinctions I shall first recall the important distinctions made between the types of justice, especially between commutative and dis-

tributive types. Remember that commutative justice is traditionally concerned with the contracts and agreements entered into by individuals, whereas distributive and social justice are more to do with the good of the community, achieved by the distribution and aggregation of natural and personal resources. I also mentioned that conflicts are possible between these types of justice and that individual promises and contracts must take into account the common good. In other words, there is no absolute distinction between private and public morality. (For further discussion of the distinction between 'intimacy' and 'privacy', cf.Gerstein,1984) This should be clear in relation to the whole question of marriage and reproductive choice. If there is a general trend towards either small families or large families, such choices have clear effects on the life of society as a whole. Although the choice of size of one's family is certainly an intimate one, it can hardly be a wholly private one.

What then is required in cases where types of justice conflict in the area of reproductive choice? Does the right of the state to protect the common good override the right of the individual couple to decide on the number of children they intend to procreate? The answer to questions of this type is a matter for particular moral theories to discuss. On one hand, it might be argued that such intimate choices on the part of married couples in particular should be regarded as sacred and untouchable, and that the state should make no effort to intervene in personal choices of this type. In terms of the Christian tradition, there might be some who would hold a strongly vocational view of procreative choice, believing in the mysterious ways of God in bestowing the gift of children on couples, such that the state must refrain from intervening. Finnis, for instance, does not believe that the common good can be invoked to limit the right of married couples to decide on family size; in

fact, the common good requires that such freedom be respected. For Finnis, this is an absolute right (Finnis,I980:225).

Here one needs to note the full meaning of the concept 'absolute right'. Strictly speaking it means that a right cannot be waived or alienated by the holder, nor can it be forfeited by him or her. With regard to reproductive rights this would imply that no person can give the power to the state (or to any person except one's partner in marriage) to limit his or her personal procreative choice; for instance, no person has the right to decide not to have any more children simply because someone offers some incentive which is attractive. Likewise, according to the doctrine of absolute rights, no person should be deprived of his or her freedom to procreate on having reached some prescribed number of children.

At the same time as upholding an absolute right to have children under commutative justice, one can presume that this position does not deny that couples may have duties not to have more children than a certain average. There is a difference between the two positions. One way of explaining the difference is by having recourse to the so called 'right to do wrong'. In a particular situation a couple might be acting wrongly in deliberately conceiving another child, but it could well be wrong for others to intervene in such a case, simply because of the intimacy of the decision. It is not clear from the comments made by Finnis whether or not his position would permit the state and society to use non-coercive means to 'educate' people to limit the size of their family on a voluntary basis.

When it comes down to conflict between important goods, Finnis holds that some goods are so basic that one must not act to suppress them directly, though individual

choices may imply acting against what he calls basic goods indirectly (Finnis,1980:120). In terms of the types of justice Finnis could claim that basic goods in commutative justice cannot be sacrificed directly in order to attain a level of distributive or social justice. This would be a matter of 'doing evil to achieve good'(Rom.3:8). However, relatively few contemporary thinkers seem to accept this point of view. Not only is there widespread opposition to the use of the direct/indirect distinction in solving situations of moral conflict (often associated with dissatisfaction regarding the doctrine of double effect with its distinction between direct and indirect or oblique intention,cf. articles by Knauer and Schuller in Curran & McCormick, 1979.), but there is also a general controversy about the weighing of values. Are basic goods incommensurable as Finnis argues, or are they in some way 'associable' as Richard McCormick believes? (McCormick, I979:334).

In the case of population control in response to over-population and its link with the prospect of world wide famine and poverty, there is a need to ask whether a crisis situation calls for crisis intervention, such that certain basic or fundamental values take precedence over other values which in ordinary circumstances one would be extremely slow to sacrifice. Remember that the good being sacrificed in this area is the exercise of the right to have children beyond the average needed to maintain zero population growth, and it is arguable that this limitation is less radical, and less an attack on a basic good, than to refuse permission to a couple to have even a single child. On the other hand, one cannot afford to overlook the fact that infant and child mortality rates in the developing countries puts the limitation of family size in a different perspective, since parents may be left without any support if their children die. Thus it seems that a willingness to limit family size in poorer

countries must be accompanied by a willingness to protect those who make great sacrifices to reduce the birth rate; in other words, the duty to limit family size on the part of individual poor couples would appear to be linked to their right to a standard of development which will compensate for their personal sacrifices. In terms of the types of justice discussed already, this would mean that limitations in the field of commutative justice in relation to the decisions of couples regarding family size should be compensated by serious improvements in the effectiveness of distributive and social justice, e.g. in the provision of health services that will reduce the infant and child mortality rate.

B. The Hohfeldian 'Clusters'

Turning now to the Hohfeldian distinctions, I want to concentrate on the conflict between the rights of couples to decide on the size of their families and the putative rights of the state to limit reproductive freedom.

The whole discussion so far has seen the need to limit family size, and thus reproductive choice, in the context of the connection between overpopulation and a crisis in the ability to feed the poor of the world, as well as catering for their other basic needs. It is largely because the word 'crisis' is used that intervening in the intimate sphere of human procreative choice seems to be justifiable. If, however, it was discovered that the crisis was in fact highly exaggerated, what would the response be? One response, I think, would be a reassessment of the strategy of intervening in individual freedom to have children. The balance would turn in favour of the rights of the individual couple. And people might well want to label the right of the individual couple with the strongest of the Hohfeldian distinctions - a claim right. It would be tempting to say that the

typical couple has the strict claim against the state to permit them to decide on the number of children they will have in their family. In other words, only very serious reasons justify intervention in personal choice in this intimate sphere.

Corresponding to this strict claim-right, would be the strict duty of the state not to interfere in personal choice. In terms of the other distinctions the state would have no claim against individual couples to limit family size. It would have no liberty-right to intervene in any way, since a liberty is defined as having 'no duty not to do X', and obviously the state has a duty not to intervene in this case. It would have no power to interfere, since a power is a legal or ethical competence to bring about a certain effect, and circumstances would not permit the state to exercise such a power. The effect in this case would be to curtail the freedom of the individual partners in a relationship to 'make' each other a parent at will. And, finally, the state would have no immunity from criticism, legally or morally, if it were to actually interfere with personal choice in this matter. In fact, the governing power of a country would suffer from a strict disability in the sense of being unable to frame laws to limit reproductive choice.

If, on the other hand, there is a definite crisis in a country as famine stalks the land, the balance of rights may tilt in another direction. This time it may be argued that the state has some right to intervene in personal reproductive choices for the sake of the overall good of the nation. Now it appears that the state has the central claim-right against individual couples that they limit the size of their family. This claim must be qualified, however, firstly by using the distinction between the right to found a family of at least one child, or some average number, and the right to procreate at will; and, secondly, with regard to the means used

in order to exercise the claim-right.

In first place, then, the right of the state (and when I mention state I always mean to include society which the state represents) would apply only against families which procreate beyond a certain number of children. The argument in favour of such intervention on the part of the state would presumably invoke the notion of distributive justice, that in a particular case or set of cases, parents have put an extra strain on the resources of the community by having too many children. In second place, the central administration must always be aware of the need to use the more coercive measures of population control as a last resort. Thus the state's claim against couples should be exercised first of all through educational methods and moral appeal, and after that by means of positive incentives, then the negative incentives, and then, as a last resort imposed sterilisation might be considered. It seems to me, however, that individual nations may differ on the morality of the more coercive means, arguing, for instance, that some means are never justified in view of certain ends. Even a crisis situation may not justify the use of some means, forced abortions, for instance.

Arguably, the claim-right of the state to interfere in personal reproductive choices depends on whether overpopulation is the cause of poverty or simply one effect of underdevelopment, for which one must seek another cause. If overpopulation is just an effect of underdevelopment, then any right to control population can only be justified if it is exercised in conjunction with a whole programme of development. Without that development the basic claim-right of the state in this sphere must be questioned, especially if the more coercive forms of population control are being introduced.

It seems to me that there are two linked manifesto rights in question here. There is the right to proper development of the resources of a country in order that its citizens may be able to participate in basic goods; and there is the right to reproductive freedom in relation to family size. What is being argued here is that the second right is partly dependent on the first. One major problem in relation to all this is that manifesto rights provide an easy excuse for states to drag their heels with regard to reform of social and economic institutions, while demanding that the poor sacrifice their basic right to reproduce without any return.

A useful distinction to keep in mind here is that between 'infringing' and 'violating' a right (cf.Thomson,I986:40-42). If I am lost in the mountains and night is drawing on, I may be justified in breaking into a mountain shack owned by someone else, in order to avoid serious illness or death by exposure. But, in doing this, I infringe the right of the owner and I ought to pay some restitution for any damage or inconvenience caused. If I simply decide to vandalise the shack out of boredom, on the other hand, I violate the property rights of the individual.

Applying this distinction to the matter of population control, the state must always keep in mind that certain kinds of interference in personal reproductive choice amount to an infringement of a right because of the connection between this intimate set of decisions and the important goods which act as justifying reasons for limiting the freedom of others. A right is infringed when some other value takes precedence over it in practice; but the choice between values or goods is necessarily looked upon as something unfortunate, and which needs some form of compensation after the infringement. Furthermore, it must be recognised that

the infringement of a right can easily be transformed into a violation if the compensation is ignored, and if the right in question is sacrificed too readily. So, the right of the State to exercise control over population in some circumstances should be seen perhaps as a necessary evil or unfortunate necessity in view of the presence of natural and moral evil in human life. But having said that, it is still possible to speak in certain circumstances of a liberty-right to infringe the right of another.

Of course in my discussion so far I have treated of two extremes where rights seem relatively clear. The possibilities were: either there is serious famine in a place or there is not. But affairs are never quite this clear. A famine may be relatively serious at the present time, but predictions are made which try to warn the world community of the possibility of a greater disaster unless quick action is taken. Advice may be given to start a strict birth control programme in order to avert worse famine. But there is no guarantee that control of population size will be the answer to the problem, since it may not be the cause or the sole cause. (James Gustafson, in his discussion of these issues, stresses the various natural forces which are often among the major causes of famine and malnutrition (1984:220ff.) Nor is there any guarantee that the situation will turn out to be as bad as has been predicted. In other words, 'scare tactics' may be used in order to introduce control of population in a developing country, and the reasons behind this may be either honest or dishonest. In situations of doubt about future consequences and about the causes of certain misfortunes, it seems to me that the balance of rights between individuals and the State are very finely balanced indeed.

With respect to the Hohfeldian distinctions one could balance claim against claim, power against power,

immunity against immunity, but it seems to me that the most useful form of balancing rights in conflict in such situations of uncertainty would be liberty against liberty. The reason for this choice is that liberty-rights require the least sacrifice of freedom in terms of the duties imposed on others. Thus, if the state has no duty not to call for population control, this liberty might be limited by the liberty of individual couples to reject this call. In other words, the state could have a limited right to attempt to persuade couples of the danger of overpopulation, but couples would have the right to disagree with the state's diagnosis of the situation. In such conflict situations some freedom is given to each side.

6.4 The Specific Christian Orientation

There should not be any great surprise that the Christian Church shows a keen interest in the whole question of population control and the moral issues related to it. Clearly the Church must show concern when the life of humankind is threatened in any way. In particular, the moral tradition of Christians must take into account the ways in which the relative dignity of the human being may be undermined by poverty and starvation on one hand, and by illicit interference by the state in intimate areas of choice on the other.

Given that the Christian moral tradition is made up of a set of particular traditions which may differ from one another significantly, it will hardly be expected that all Christian denominations will come to exactly the same conclusions on this matter of population control. Indeed, there are very different approaches to the analysis of the question in the first place. Curran, for instance, points out the ambivalent attitude of the Roman Catholic Church on the question of whether there is a population

'problem' (Curran,1985:228; cf.Walsh,1974:632-636). In fact, the Vatican seems to prefer to take the developmentalist approach, transferring the 'problem' away from overpopulation. Dyck, on the other hand, writes of the more explicit recognition of the problems of population control in other Christian denominations, especially the United Methodists (1970) and the United Presbyterians (I972) (cf. Dyck,1986:486). Then there will be radical differences in opinion regarding the means used to control population, even in times of crisis. The Roman Catholic Church's opposition to contraception and sterilisation, not to mention abortion, is well known. Thus, even the voluntary control of family size presents different approaches within the overall Christian tradition.

Is there any specific contribution to be expected from the Christian Church in this whole area? If there is, one will hardly expect the contribution to be at the factual, scientific level, in arbitrating between the Neo-Malthusian and Developmentalist positions, for instance. I do not think that the Church's role is to provide some extra infallible knowledge which settles once and for all the differences between population experts (though this is not of course to deny that the Church may have her own experts in the field). Any contribution from the Church will be more from the values perspective (keeping in mind that the analysis of population issues is often a combination of facts and values). It may also involve the particular kind of justifying reasons discussed earlier in this essay.

A Sinful Influences

The first contribution of the Christian tradition in this area must surely be its realism in recognising the presence of sin in human life, including the process of moral reasoning and decision making. For Stanley

Hauerwas, sin in human life involves the perversion of desires and a lack of truthfulness concerning the present unsatisfactory state of human existence. As he puts it, humans seek fulfilment in religious faith often 'without recognizing that in order to know and worship God rightly we must have our desires transformed' (Hauerwas,1984:14). So sin is found most clearly at the level of desire, and hence a basic Christian task is to examine one's conscience in relation to population control if one has some interest in the matter (for instance, as a member of a foreign state offering aid to a developing nation, including birth control technology, or as member of the board of a multinational with economic interests in the matter of birth control.). One should keep in mind the work of theologians like Reinhold Niebuhr who have stressed the increased likelihood of moral corruption in human groups, and this might be applied to the activities of both foreign powers and local politicians in attempting to limit family size (Niebuhr,1960:chs.4&5).

Modern discussions of sin,then, have tended to move away from an individualistic and atomistic understanding of the presence of evil in human life. The atomistic understanding which stressed individual wrong actions, especially sins of commission, has been criticised in the light of the notion of 'fundamental option' which tends to stress patterns of action over time, including sins of omission (cf.Fuchs,1970b; Cooper,1972). The individualistic understanding of sin has been corrected to an extent by references to 'social sin', described by Richard McCormick (1978:35) as 'that enslavement of persons [which] occurs through structures'.

Concentrating for a moment on this idea of sinful structures, McCormick specifies two ways in which such structures operate today. The first is referred to as '"operational structures"' and involves 'zoning laws, welfare systems, tax systems, health-delivery systems,

international monetary systems' (ibid.). The second is referred to as '"ideological structures"',which he describes as 'nothing more nor less than a corporately adopted priority' (ibid.). Then he declares that, 'An ideological structure becomes enslaving when it makes some value other than individual persons the organizing and dominating value.' His conclusion is well worth quoting:

> In summary, then, when large numbers of people are suffering or are denied their rights and opportunities, look for a value that subordinates them and one that has been made a structure by becoming the organizing force of policies and decisions (ibid.,35).

It is not too difficult to see how McCormick's analysis above can be applied to certain efforts to control population in the world. One would do well to consider the influence of sin at the level of both 'operational and ideological structures'. Note too that the sin enters quite 'respectably' by stressing a particular value and playing down the fact that other key values (to which people have rights) are being subordinated in the process.

B Means and Ends

To my mind the second contribution which the Christian Church can offer humankind in its moral decision making with regard to population control involves the connection between ends and means. This does not mean that Christianity simply preaches slogans of the type 'The end doesn't justify the means'. What is needed in first place is an understanding of the limited ends open to humanity within a Christian world-view. This is the initial point made by Paul Ramsey (1970) in his discussion of the relationship between means and ends. In response to those who want to ensure a genetically bright

future, Ramsey says that the Christian 'is not under the necessity of ensuring that those who come after us will be like us, any more than he is bound to ensure that there will be those like us to come after us.' (1970:29-30). And regarding the link between means and ends, Ramsey warns that 'any person, or any society or age, expecting ultimate success where ultimate success is not to be reached, is peculiarly apt to devise extreme and morally illegitimate means for getting there.' (ibid.,31). Applying this insight to the means used to 'ensure' that famine and poverty is overcome, it should be stressed that Christianity does not promise an end to these tragedies in this life, and if one is frantic to achieve just that, there is the real possibility of utilising wrong means.

Once one has realistic ends in view, the Christian will then seek to apply moral expertise in judging the appropriate means to that end. And this is no easy matter, especially when the means to population control is thought to involve the infringement of a basic right. Part of the Church's moral expertise in this area of ends and means is of course the traditional doctrine of double effect, which, for all the criticism it has received of late, does centre attention on some key issues in making moral decisions, including the proportion between the effects and the intention of the agent(s).

When it comes to judging the appropriateness of certain means of population control, the churches may be expected to agree at least on those means which should be totally excluded from consideration depending on the circumstances. The reference to circumstances here is to the judgement on whether there is a crisis at hand or not. If there is, the Church may support some limited coercive measures as a last resort in order to control birth rates; if there is no crisis, then even those coercive measures should be condemned. A good example of

the Church's taking a firm position on the means to limit population growth is the general criticism of 'lifeboat ethics' on the part of Christian ethicists. Arthur Dyck holds firm against such means being accepted by Christians:

> Some will not relinquish their commitment to save lives as the need arises even if it should mean disaster for the world: some values are seen as more important than survival. Others argue that it is not survival as such that is the issue, but rather the survival of a way of life. (Dyck,1986:486).

The statement reflects a 'quality of life' type argument, in saying that the ruthlessness involved in letting people die without any aid cannot be a means to a good end, precisely because the means is part of the end. There is a clear contradiction here in the moral structure of the action, one which fails to live up to values of either justice or love. Christianity should be willing to risk the judgement that some actions should never be contemplated in view of the fact that it is impossible to see how even the best end could compensate for a morally wrong means. Indeed, a judgement of this sort is probably the underlying meaning of the language of intrinsically evil acts. And this point is also related to my earlier discussion of the maxim that it is better to suffer evil than to do what is evil. So, if humanity arrives at the state of affairs when it has to be as callous as Hardin suggests regarding suffering humanity, it could be argued that a question mark hangs over the whole reason for living on. And if the position that the good man cannot be harmed is advocated, given that 'harm' is understood in the moral sense, people might be willing to suffer with the poor rather than live on at their expense, that is at the cost of sentencing them to death.

C. Christian Vocation

The final contribution I shall mention here has to do with the concept of vocation, which has a long religious pedigree. Though some Christians (especially in the Reformed tradition) dislike the term 'vocation' because of its associations with the special calling to monastic or 'religious life', the notion of a 'calling' is an important biblical concept. (On the Reformed tradition regarding 'vocation', note how the article on this subject in The Encyclopedia of the Lutheran Church (1965) treats of the notion as secondary to that of 'Work'. This reflects Luther's own preference for a functional interpretation of vocation in terms of 'offices', cf. Helm,1987:58.)

In the Old Testament, according to Colin Brown (Brown,1975), the idea of a call seems to be connected with the voice of authority:

> Such a call is always a command, never a mere invitation (Job 13:22). This call expects that men should- hear and answer. Hence it is not despotic compulsion. Men can refuse to obey the call of God (Is.65:12; Jer.13:10); they can refuse to hear it (Is.50:2; Jer.7:13) or seek to avoid it (Ex.3:11;4:1;10:13; Jer.1:6) (Brown,1975:272).

According to J.I. Packer:

> The developed biblical idea of God's calling is of God summoning men by his word, and laying hold of them by his power, to play a part in and enjoy the benefits of his gracious redemptive purposes (Packer,1984:184).

In the New Testament Brown calls attention to the use of the word kaleo to refer to invitation in the parables of the Great Banquet (Lk.14:16-25) and the Marriage Feast (Mt.22:2-10). He claims that there is usually a hint of privilege and command in these parables, as in 'I came

not to call the righteous, but sinners' (Mt.9:13; Mk.2:17; Lk.5:32). 'These parables make it clear that, when a man ignores the divine invitation, he not only misses an opportunity, but may be squandering his life and hope' (Brown,1975:274).

Such references do not of course prove that God 'calls' persons to marriage and parenthood in the same way as he calls persons to faith in him, or to perform a particular task as prophet or apostle. Callings to some state of life, such as marriage or the single way, are subordinate callings in scriptural terms, but they cannot be ignored if one wishes to hold a relatively strong doctrine of divine providence.

Mention of divine providence in relation to vocation or calling is not an attempt to mystify the basic moral issues involved in relation to rights. Although there is a mysterious aspect to God's call, whether it be to faith or to a particular state of life, in the case of a call to a particular state there are also human criteria for judging or discerning its validity. For instance, a calling to a state of life must involve a manner of living which embraces certain goods. Some of the goods in relation to procreation have been mentioned already. But as well as involving these goods, there are the major criteria of aptitude for, and inclination towards, the particular state. All sorts of moral, psychological, and physical elements are involved in the discernment of God's call. The response to a call is then both God-directed and constitutive of human flourishing, if the call is true and the response sincere.

Because moral elements are involved in choosing a state of life within the general Christian vocation of following the normative humanity of Jesus Christ, one can understand why Christian ethics must be concerned with issues like population control. If the state interferes

unduly in this area, it not only invades the area of marital intimacy, but may obstruct the conscientious decisions of couples who believe that God is calling them to parenthood, not just once or twice but on many other occasions, i.e. to have a larger than average family. On the other hand, the Christian Church must remind potential parents of the duties they have to provide a secure home for their children as well as the duty not to put undue pressure on the resources of the state

The Church's role in relation to population control and reproductive freedom needs to be both supportive and critical. Because of the important goods involved, which are related to human relative dignity, the Church must support the basic claims regarding choice of family size on the part of individual couples, and the need of the state, representing the whole community, to control family size in relation to the resources available to support a decent quality of life for those already born and those who will be born. The Church must not be seen in some simplistic fashion as 'on the side of' the individual against the state, or vice versa.

6.5 Conclusion

Though the title of this chapter refers to population control in general, the major part of these pages have dwelt on problems arising from anxieties about overpopulation and its relation to world hunger. The more optimistic Neo-Malthusian approach to the problem thinks that strict population control, limiting family size in developing countries, is a major element of any attempt to avoid the tragedy of famine. However, there is also the Developmentalist approach which shows some scepticism concerning the alleged causal relation between overpopulation and famine.

Much of this chapter has been a discussion of these positions. And it has been difficult to come down absolutely in favour of either. I tend towards the Developmentalist point of view, seeing overpopulation as a problem, but mainly as an effect of underdevelopment and uneven development. I am somewhat sceptical of prophecies concerning future crises and the way in which such dire warnings can provide a rationalisation for violating reproductive rights of couples in the Third World (cf.Eberstadt,1979:293-294, who argues that exaggerated claims relating to the extent of world hunger leads to apathy in the developed nations.). However, I can see how the language of rights might have to be applied in different ways if the Malthusian nightmare becomes a reality. The claim of the state, as representative of the community at large, against individual couples would be stronger than it is at present. Depending on the extent of the crisis, however, the state would have to decide on the minimum number of children allowed per couple before the crisis is surmounted. Note that the more basic right of couples is to have at least one child, rather than to have a large family. However, in poor countries where infant and child mortality is high this point may have little relevance; hence the crying need for economic and social development to reduce the mortality rate. Nevertheless, I have stressed that any curtailment of the right of parents to extend their family size can be seen as an infringement.

Even where there is some right to limit family size, the state must still show care in the use of appropriate means to achieve this. Some means involve an attack on other goods, especially freedom of conscience, but also, as in the case of compulsory sterilisation, on the claim to bodily integrity. I pointed out that traditional Christian ethics (especially Roman Catholic) has paid much attention to the appropriate relationship between

ends and means in line with the scriptural maxim of not doing evil in order to achieve the good.

Thus, the main issue of this chapter has been an examination of conflicting goods and their associated rights. On one hand, there seem to be strong justifying reasons for respecting the intimate decisions of couples to decide on family size. While, on the other hand, the so-called 'problem' of overpopulation, with its alleged effects on participation in certain basic goods and quality of life, appears to support the right of state and society to set some limit to reproductive freedom. The special difficulty experienced in eliciting the 'facts' about world hunger and overpopulation and establishing a causal connection between them, leads to some scepticism concerning some attempts to curtail reproductive freedom. One wonders whether some efforts to limit family size is not a violation of reproductive rights, rather than, as is sometimes claimed, an unfortunate infringement of those rights.

Finally, I have suggested that part of the Christian contribution to this question involves a reminder of the presence of sin in the world, both in individual and group life. Thus, the explicitly mentioned justifying reasons for controlling population may conceal less reputable motives, including the selfishness of not caring for the hard work of sharing resources with the poor, and the promotion of development in less prosperous lands. Included in this point is Ramsey's warning about becoming obsessed with strictly impossible ends, such that extreme means are contemplated and even enacted. The notion of parenthood as a Christian vocation likewise takes into account the need for moral discernment when making decisions about family size, since the right to become a parent must be qualified by the right of children to good parenting, as well as the interests of future generations.

Chapter 7

Reproductive Rights and the Mentally Retarded

7.1 Introduction

In my discussion of population control and the need to limit family size in certain cases, the major suggested justifying reason for limiting freedom was the relationship between overpopulation and famine. If that relationship could actually be established there would be some justification for infringing, but not violating the reproductive rights of certain couples. It was suggested that the right to reproduce would be infringed if couples were limited to having an average number of children needed to maintain zero population growth. To refuse the freedom to have a single child would amount to a violation of the more basic right. In other words, the more basic right to found a family of at least one child was recognised as a practical absolute even in situations of crisis.

When the focus turns to the question of the reproductive rights of the mentally retarded, however, one generally has in mind the removal of the right to found a family. At least with regard to the severely mentally handicapped, it is widely accepted that they should not procreate. In this chapter I ask in first place if it makes sense to talk of the mentally retarded as having reproductive rights, and if this is accepted as a working assumption, then there is the further issue of the possible limitations of the right and the reasons for curtailing or removing freedom from the individuals in question. There is also a need to consider the particular difficulties arising from the notion of 'non-voluntary sterilisation' and the accompanying notion of 'proxy' or 'substituted' consent. Nor can I afford to ignore the wider issues regarding sexuality and the handicapped. And

finally, I must attempt yet again to put these matters in a Christian perspective.

7.2 The Possibility of Reproductive Rights

I have already mentioned in this essay the statement by the United Nations Declaration that 'men and women of full age...have the right to marry and to found a family' (Art.16,1). In 1971, the U.N. adopted a Declaration of the Rights of the Mentally Handicapped, which included the statement 'The mentally retarded person has the same basic rights as other citizens of the same country and the same age' (cf. Craft,1987:13). In the realm of reproductive choice, the basic right is a combination or cluster of Hohfeldian elements, including the right to beget genetic offspring, to rear children, and to space births at one's own discretion (Bayles,1978:38). But should one take seriously the declaration that all mentally handicapped people have all these rights? Assuming that the right to found a family is a basic right, one could still ask if it makes sense to draw a parallel between the mentally retarded and 'normally' developed persons of the same age. In some cases the parallel can be made, where the mental handicap is of a moderate type, but it is more difficult to establish this point as retardation becomes progressively more debilitating. In fact, I would go so far as to argue that the mentally incompetent have no reproductive rights as such.

So the first point I want to make is to underline the need to distinguish between the degrees of handicap within a large heterogeneous group. (Rosalyn Kramer Monat,1982:5, distinguishes between mild, moderate, severe, and profound types of retardation. I shall use the terms 'moderate' and 'severe' in a general sense in what follows.) If one is thinking of a case where a

person is severely retarded, the basic right to marry may itself be in question; and if there is no competence in this area, it will follow that no right to rear children can be allowed, assuming the rights of children to competent parenting. On the other hand, the moderately handicapped person may be competent to enter into marriage, but a question mark will still hang over the competence to rear children.

However, it may be the case that special help from social workers, counsellors and friends could help the person (especially if married to a similarly retarded partner) to adapt to caring for at least a single child. If help is needed over and above that required by normally developed persons, then there is a sense in which the rights of the mentally handicapped are different from the rest of the population, since in order to participate in the good of being a parent and raising children more resources than usual are required to enable the handicapped person or couple to achieve that end. The moderately mentally retarded may have the same basic rights with regard to founding a family, but specialised rights may be involved in the means to achieve this good end. The question then must be, how far society is willing to contribute to the special resources required to enable the moderately handicapped to participate in this good?

I have noted that having a reproductive right in the full sense requires some ability on the part of the individual person or couple to participate in the good of raising children. (I am assuming here that reproductive rights are not just to do with the experience of being pregnant, but that this experience is a means to the end of raising one's genetic offspring.) This ability may be actual or potential. In the cases of potential ability I am thinking about mentally retarded persons whose prognosis is good, who are somewhat in the position of

normal children in that, given time and development, their sexuality and ability to develop responsible relationships will mature. One should recall the point made two chapters ago, namely, that there is a sense in which children have reproductive rights, though at the time they are not able to exercise them. Various actions of related adults may have an effect on the future use of reproductive capacities. In other words, consideration must be given to future possibilities of parenting for fear of closing off these options without due cause. I now look in more detail at the reasons used most often to justify the limitation of reproductive freedom of the mentally retarded. They all relate to possible bad effects arising from the retarded having children.

7.3 Reasons For Limiting Such Rights

A The Genetic Rationale.

Reference was made above to the criterion of parental incompetence as one of the reasons given for limiting the freedom to procreate. This reason would also apply to the right to adopt or foster children. Quite simply, according to this position, the interests of future persons, children not yet born, must be given precedence over the rights of married persons judged to be mentally handicapped. But would the mentally handicapped be permitted a more limited right to act as gamete donors? This must be doubtful due to the possibility in some cases of passing on genetic defects. As Michael Bayles (1978) puts it,

> Many mental illnesses and much mental retardation are now known to be genetically based. The difficult issue is how likely it must be that a child will have a defect. No absolute probability such as 25 percent can be specified as a minimum. Instead, the probability sufficient to justify sterilization will vary with the seriousness of the

> defect; the more serious it is, the smaller the probability needed to justify a sterilization. (Bayles,1978:40)

Thus, even if a mentally retarded couple were deemed relatively competent as parents, there would still be the moral question about the risk of bringing another retarded person into the world. Of course there is always this risk in procreation, but the risk is greater in the case of the mentally retarded. In fact, J.R.Kramer argues that retarded parents who choose to have children may risk violating their offspring's right not to be retarded' (Kramer,1976;Thompson,1978:31).

Concern about future persons or generations can be seen from two perspectives. On one hand, one can concentrate on the particular individuals introduced to this world at a strict disadvantage in comparison with normally healthy children. One could say that life in this world is difficult enough to cope with without one's parents passing on a negative genetic inheritance. On the other hand, one can concentrate on the wider issue of the overall gene pool; in other words, one can consider the eugenic issues.

Regarding the possible 'rights' of future persons not to inherit genetic defects from their parents, there is room for healthy scepticism for several reasons. The first reason is connected with 'wrongful life' actions in law, which appear to require a comparison between life with some handicap and non-existence. But it is arguable that such a comparison does not make sense because of the impossibility of grasping the notion of non-existence as a kind of state. Secondly, even if such comparisons were possible, they would be highly subjective. How could one develop a list of handicaps which would amount to criteria for claiming the right not to be born? I doubt if handicapped persons themselves could agree on such a

list. Thirdly, how could claims work in such situations, since the future person does not yet exist? And once the person did exist, the damage, if one could call it that, would be already done. All the right could amount to would be to criticise one's parents for bringing one to birth. But it is doubtful whether this is a satisfactory kind of right (in fact, wrongful life cases are not directed against parents but against medical advisers deemed to have given wrong advice or insufficient information).

If it is said that the right not to be born retarded is to be claimed by others on the behalf of future persons, then one faces the question 'Who will be given such a power to claim against parents in such an intimate sphere of life? Finally, one can question whether it is appropriate to speak of the rights of future persons. Rights can only be predicated truly of existing persons, even if they are not yet in a position to claim.

Regarding the eugenic rationale, before the Nazi excesses and the development of a pejorative meaning, sterilisation for eugenic reasons had a certain degree of respectability, a respectability reflected in some legal systems. Michael Bayles refers to some examples from the United States. Seemingly, the State of Indiana was the first to adopt a eugenic sterilisation statute, in 1907. This move was followed by other states, especially after the Supreme Court upheld the validity of such statutes in 1927. On that occasion the attitude of the court was well expressed by Justice Oliver Wendall Holmes:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped by incompetence. It is better for all the

> world, if instead of waiting to execute dangerous degenerate offspring for crimes, or let them starve for their imbecility, society can prevent those who are manifestly unfit for continuing their kind. The principle that sustains compulsory vacination is broad enough to cover cutting the Fallopian tubes...Three generations of imbeciles are enough. (Buck v. Bell,274 U.S. 200,207 (1927); Bayles, 1978:37)

There was a change of attitude, however, in the 1940s, as instanced in the 1942 decision to hold an Oklahoma statute unconstitutional (with regard to the equal protection clause of the Fourteenth Amendment) (cf.Skinner v. Oklahoma,316 U.S. 535 (1942).) In the 1970s, according to Bayles, 'courts have ruled both for and against involuntary sterilisation of the mentally incompetent' (ibid.,37-38), but it is interesting that judgements in favour of compulsory sterilisation no longer appeal to the eugenic rationale; instead the concern is for the children born of the mentally handicapped in terms of their inheriting their parents' condition and the disadvantage of being raised by incompetent parents.

One does not hear the kind of language used by Justice Holmes, that the incompetent 'sap the strength of society', or that society needs to anticipate serious crime by sterilising the parents who may produce deviant offspring. These forms of argument have been largely discredited on both moral and scientific grounds. This is not to say, however, that such reasons as just mentioned are not still a motivating factor in many cases, even though more 'respectable' moral arguments are put forward explicitly. (Mason and McCall Smith (1983:53), in their discussion of this issue of sterilisation of the retarded, suggest that relatively strong reasons exist for adopting this course of action in the case of the severely retarded, because '[T]he alternative is to allow a person manifestly ill-suited for the bearing of

children to saddle the community with the cost of raising children who will themselves, unless adopted, be deprived of the opportunity of a normal upbringing'. Note how the welfare of society is mentioned before the child's good.

Sheila McLean notes the ambivalence present in the American legal system on this matter of involuntary and non-voluntary sterilisation of the retarded, but she comments favourably on what she sees as a trend towards protection of reproductive choice. As I have noted already in relation to McLean's position on reproductive rights, such rights are to be seen in a wider context of the right to self-determination, part of which is the right to privacy. Thus McLean cites the case of Carey v. Population Services International:

> The decision whether or not to beget or bear a child is at the very heart of ....[a] cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy. (431 U.S. 678; McLean,1986:111)

McLean at the same time laments the fact that not all states in the Union have applied the principle just enunciated to the retarded. In particular she cites the case of North Carolina Association for Retarded Children et al v. State of North Carolina et al, where the court stated that the mentally retarded comprised a particular category who 'may rationally be accorded different treatment for their benefit and the benefit of the public' (420F. Supp.451 (1976); ibid.,112). Note in particular in this quotation the paternalistic emphasis preceding the more utilitarian rationale of general benefit or welfare. More will be said on this question of paternalism after I treat briefly of the alleged rights of children to 'competent parents'.

B. The Parental Incompetence Rationale.

Some mention has already been made of this rationale, so I shall not labour the point here. However, some points should be made to highlight some of the problems judging incompetence.

In first place there is the question whether the putative right to competent parents is not on the same level as the putative right not to be retarded. However, it seems more difficult to establish the right to competent parents: firstly, because of the relative vagueness of the term 'competent', and secondly, because having incompetent persons probably does not affect children in the direct way genetic defects do. For instance, the state and the community may help both parents and children to cope with some levels of incompetence, whereas genetic defects seem more intractable problems to have to face.

In first place, then, one can examine the concept of parental incompetence. Obviously this concept involves both factual and value judgements. And if the whole question of parental competence is controversial, one can expect the problems to be somewhat exacerbated in relation to the mentally retarded. Michael Bayles warns against making easy judgements about the criteria for 'mental incompetence':

> ..., psychologists and mental health workers do not agree about the psychological conditions or criteria of mental incompetence. Both factual and value disagreements are involved. People with different values have different conceptions of what is needed to protect oneself. For example, some claim that the criterion that all people with an IQ below 70 are incompetent is too stringent, does not allow for individual variation, and uses the wrong basic measure. Moreover, it is now unpopular to make judgments about general mental incompetence; the emphasis is upon specific functional incompetence. (op.cit.,38; also cf.Gaylin,1982)

Bayles himself thinks the best sign of incompetence is the legal standard required for the appointment of a guardian to oversee the affairs of a person. This occurs when a person is 'incapable of understanding and acting in the ordinary affairs of life' (Bayles,1978:38). Now, applied to the right to become a parent and raise children, Bayles's argument seems quite strong. After all, if a person cannot manage his or her own affairs in a responsible fashion, then it is unlikely that such a person can take on the onerous responsibilities of parenthood.

With regard to the notion of specific functional incompetence mentioned above by Bayles, to apply this to parental incompetence would require of the agent to: list the particular functions involved in raising children; note if specific persons have the aptitude for each function; ask if special help can be provided which will make up for some incapacity in special cases; and, finally, consider whether or not the other partner in the marriage can supply for the weak points in the spouse/parent in question. On one's answers to these questions will depend the degree to which one might feel justified in limiting the reproductive freedom of the retarded. And remember that restriction of freedom in such a basic area of self-determination will always be to some degree an infringement of a right; what has to be avoided at all costs, however, is the violation of a right.

Thus, in some cases one may be justified in limiting the family size of a handicapped couple because they can only cope with raising a single child, but one might have no justification interfering with the more basic right to found a family by refusing a couple the opportunity to procreate in the first place. It is an extremely difficult question to balance any putative right of offspring not to be retarded or to have 'normal' parents

against the right of (at least) the moderately retarded to experience the joy and the challenge of parenthood.

C Paternalism as a Rationale.

Whereas the last two sections presented reasons for limiting reproductive freedom on the basis of a conflict of rights between prospective parents and any children they might procreate, the paternalistic rationale is geared towards protecting a person 'from himself or herself', so to speak. I have already shown something of this rationale in the legal criteria for appointing a guardian to look after a person's interests. The point at issue here is whether the mentally retarded person suffers from such incompetence that his or her acts are not really free, not truly part of an attempt at self-determination, but part of an irrational impulse which harms the person, such that the person requires another to act in his or her interest. The problem presented here is that of distinguishing a justifiable paternalism from the unjustifiable intervention in the person's 'right to do wrong'. Does the mentally retarded person in some cases have a right to do wrong, which is a lesser evil than permitting others to intervene 'in his real interest'? It is of course difficult to answer this in the abstract, but one should perhaps draw a parallel between the case of some mentally retarded people and the case of parents who have to judge the degree of freedom to allow to their still immature adolescent children. Sometimes parents have to allow their children to make mistakes rather than protect them at all costs.

The notion of freedom is of central importance as I just pointed out. The so called 'right to do wrong' only makes sense in the light of the doctrine of freedom of conscience. Often it is better to permit a person to harm himself or herself rather than take away the individual's

freedom of decision and action; and this may even apply to harm done to others (cf. Eric D'Arcy's discussion of the doctrine of Pope Pius XII which holds that it is not always the duty of men and women to 'repress all error and deviation'. God's own infinite perfection does not require him to do so, and this applies also to humanity (D'Arcy,1961:242ff.; AAS,45(1953),798).) But, it seems to me, it does not make any sense to speak of freedom of conscience or the right to do wrong in the case of the mentally incompetent or severely mentally retarded- hence the justification of some forms of paternalism. The freedom of conscience I am interested in protecting depends for its existence on an acceptable degree of understanding concerning the ends of action, including some notion of responsibility with regard to self and others.

In application to the reproductive freedom of the mentally retarded, there must be a doubt in many cases as to whether patients understand in a responsible way the implications of sexual activity. Where there is no understanding of procreation, but still a desire to fulfil basic sexual instincts, there would appear to be some justification for paternalistic protection of the individual from the consequences of instinctive actions. This presumes of course that the handicap is of a type that excludes any possible training in understanding and responsibility with regard to procreation. When a person acts without freedom, without a basic understanding of the effects of the action, there is no sense of speaking of a personal right to act in such a way; in fact, there would arguably be a right to be protected from such harm against those who have some understanding of the effects in question as well as some connection with the handicapped person.

Another way of seeing the rationale behind paternalism in the cases of mental incompetence, is to say that the

actions of the incompetent person are not in the full sense his or her own; it is as if someone else, or some force, is moving the person to act in a way detrimental to his or her welfare, and in the face of which the person requires protection. Whilst the incompetent person has little freedom, he or she does still have interests which should be protected. The question of rights still applies, since the mentally incompetent can benefit from society's protection. However, it is debatable whether the rights of the incompetent include reproductive rights. As I have said, I do not approve of reference to reproductive rights in relation to persons who have virtually no chance of ever appreciating the good of procreation. The rights of the mentally incompetent in relation to their reproductive faculties are an aspect of general rights all persons have to appropriate health care. (I think a similar point needs to be made when talking about cases where the mentally incompetent become pregnant by accident - the right not to be forced to have an abortion should be argued either from the point of view of the rights of the fetus to life, or the right of the mother to her bodily integrity; cf. Mahowald,1985:22 & Abernethy,1985:23, for comments on a 'case study' relating to a mentally ill woman who refuses to have an abortion.)

At this stage it will be useful to refer to two examples of legal paternalism with regard to limiting the freedom to reproduce of the mentally handicapped. The cases in point come from English legal judgements and have to do with proposed sterilisation of retarded girls.

In re D (a minor) (Wardship: sterilisation).1976 Fam.185

Diana Brahams (1987) describes the basic details of this case concerning a a girl aged 11 with Sotos syndrome (cerebral gigantism) as follows:

> She had a dull normal intelligence; and her clumsiness was lessening and her behaviour improving. It was not possible to predict her future role in society but it was likely that she would have sufficient capacity to marry. Her widowed mother feared that she might become pregnant and wished her to be sterilised. A hysterectomy was proposed , with the support of her general practitioner, a paediatrician responsible for her care, and a gynaecologist. (Brahams,1987:757)

However, before the operation could take place, an educational psychologist objected and had the girl made a ward of court. In the subsequent judgement, Mrs. Justice Heilbron 'held that the proposed operation involved the deprivation of a woman's basic human rights to reproduce, and would be, if performed on a woman for non-therapeutic reasons and without her consent, a violation of such right.' (Brahams,ibid.) The judge held in this case that on the basis of the evidence before her the operation to sterilise the girl was 'neither medically indicated nor necessary and would not be in the girl's best interests' (ibid.).

Here is a case, then, where the paternalism of parent and doctors was deemed unjustified, and where the judgement of the court was needed to bring out the true interests of the child. In a sense, however, the court's judgement was itself a paternalistic one in view of the fact that the girl's own views on the matter were not central to the case. The court instead tried to predict a future state of affairs and to allow for a basic option or freedom to be exercised at a later date. One must remember that the presence of a right to something does not depend always on a present desire or felt need. A person in a depressed state, who is considering suicide, still has a right to life, though living on seems to have little attraction for him or her. The desire to marry and have children may not be in the mind and heart of a child, but the child has the right not to have future options curtailed at this early stage without serious

justification. Thus, in the case under discussion, it was the girl's potential to marry and found a family at a later date which led the court to prohibit the operation.

In re B (a minor) (Sterilisation).

This more recent case from 1987 gave rise to much media interest. The situation of the minor is given in a brief summary by Brahams:

> A girl born on May 20, 1969, was the second of five children.....In May,1973, a care order was made and parental rights were vested in the local authority. The child lived in local-authority homes and spent weekends and parts of school holidays at her mother's home. She was of low intelligence, but she did not need protection under the Mental Health Act 1983. She could dress herself, attend to herself during menstruation, and perform simple domestic tasks. She spoke only a few words at a time. She could not be allowed out alone because she did not understand traffic or the use of money. She suffered from epilepsy, but the fits were controlled by drugs. She was moody and could become aggressive and violent. She had a history of reacting badly to medication. She could hope to attain the skills of a 5 or 6 year-old in some areas. (ibid.,757)

Brahams goes on to speak of the recent growth in sexual awareness in Jeanette's life and the feelings of anxiety on the part of her mother and guardians that she might become pregnant. The Times Law Report on the proceedings adds a further important detail concerning the girl's sexual development,

> She had all the physical sexual drive and inclinations of a physically mature woman of 17 and had already shown that she was vulnerable to sexual approaches. She had already once been found in a compromising situation in a bathroom, and there was significant danger of pregnancy resulting from casual sexual intercourse. (Report, May 1,1987:37)

What would be the effects on this girl if she were to become pregnant? The Law Report answers in these terms:

> She would not understand, or be capable of easily supporting, the inconveniences and pains of pregnancy. As she menstruated irregularly, pregnancy would be difficult to detect or diagnose in time to terminate it easily.
>
> Were she to carry a child to full term she would not understand what was happening to her, she would be likely to panic, and would probably have to be delivered by caesarean section, but owing to her emotional state, and the fact that she had a high pain threshold she would be quite likely to pick at the operational wound and tear it open. (ibid.,37)

In the light of these facts and predictions of facts, the Sunderland Borough Council, with the mother's support, sought to have Jeanette made a ward of court with a view to having her sterilised. (It was considered that contraception was not a viable option.) Justice Bush gave permission for the operation but the Official Solicitor appealed the case at the Court of Appeal. That appeal was rejected, but further leave of appeal was granted, this time to the Lords, and their judgement upheld the original decision to permit sterilisation of Jeanette.

It is interesting to note some of the arguments put forward by the Law Lords to justify their judgement. For instance, in the words of the Law Report,

> Lord Oliver said that no one was likely to forget that we lived in a century which, as a matter of relatively recent history, had witnessed experiments carried out in the name of eugenics or for the purpose of population control, so that the very word "sterilization" had come to carry emotive overtones.
>
> It was important at the very outset, therefore, to emphasize as strongly as it was possible to do so, that the appeal had nothing whatever to do with eugenics. It was concerned with one primary consideration and one alone, namely the welfare and best interests of the young woman, an interest which was conditioned by the imperative necessity of ensuring, for her own safety and welfare, that she did not become pregnant (ibid.)

These remarks speak for themselves. They take into account the emotive issues involved and the unsavoury associations linked with sterilisation of the retarded. Also the strictly paternalistic rationale is underlined. The court considered the earlier case of re D (a minor) which I have discussed above. And the Lord Chancellor accepted the reasoning behind that judgement refusing permission to sterilise the minor, namely, that it would violate a basic human right to reproduce. However, in this case, he felt that such a right was not in question, since 'that right was only such when reproduction was the result of informed choice of which the ward in the present case was incapable' (Report ibid.)

Interestingly, the court recognised the full seriousness of the issues involved in this case. Thus, Lord Bridge, in concurring with the judgements of his colleagues, 'observed that the Official Solicitor acted with complete propriety in bringing the case first to the Court of Appeal and then to their Lordships' House' (ibid.) This was said in view of the great public interest, and even disquiet, regarding cases of this type. And in order to calm some of those fears the Lords felt obliged to strictly limit the exercise of paternalism, in particular by taking some power out of the hands of parents and guardians and passing this on to the justice system. Thus Lord Templeman said that sterilization of a minor should only be carried out with the permission of a High Court judge. As the Times Law Report put it,

> A court exercising wardship jurisdiction emanating from the Crown was the only authority empowered to authorize such a drastic step as sterilization after a full and informed investigation. (ibid.)

In the two cases discussed in the preceding pages, one should note two different exercises of paternalism, a paternalism which is both legal and moral. On one hand,

was a situation where the court refused leave to sterilise the minor, because it felt that the girl's best interests would not be served by the operation, i.e. her reproductive rights would be violated. It was a case of a conflict of paternalisms, since the girl's immediate guardians/carers were presumably also acting in her best interest, but mistakenly according to the judgement of the court. On the other hand, the second, and more recent case, was a situation of potential conflict between two sources of paternalism, but which turned out in practice to be an agreement on the best interests of the minor, i.e. that sterilisation did not amount to a violation of her rights.

7.4 Problems of Non-voluntary Sterilisation

One should be aware of the distinction between involuntary and non-voluntary sterilisation. Sterilisation of the involuntary type involves an action which bypasses or ignores the patient's own wishes. It ignores the requirement of informed consent. One can see examples of involuntary sterilization in relation to population problems, where some states (India and China, for instance) have attempted to use this as a method to control family size. And one could also mention some cases where criminals have been sterilised as a punitive measure. Non-voluntary sterilisation, on the other hand, refers to situations such as the ones just under discussion where the procedure is imposed on a person who is mentally incompetent and cannot consent to the operation, even though it is thought to be for her benefit.

In such cases of incompetence a special form of pater-nalism is required on behalf of the patient. According to Raanon Gillon (1987), the usual method used is like that used in relation to children, 'where rights

are exercised by proxy on the child's behalf.' (Gillon, 1987:59)

There is no doubt that in many situations parents or guardians play a vital part in protecting the rights of their children or those placed in their care; most often, perhaps, in consenting to medical treatment. But it is also well known that not all parents act in the interests of their children. There are occasions in fact where children have to be removed from the family home and made wards of court for some period of time, since the basic needs of the children are not being met in the home environment.

With regard to the reproductive capacity of the mentally retarded the position seems to be special. On one hand, there are similarities with the position of children in need of protection, but on the other hand the retarded are not children when it comes to their sexuality. As was seen when I discussed the Jeanette case above, this involves a person with the sexual instincts of a young woman, but with the understanding and level of responsibility of a 5 year-old. Furthermore, there is little or no hope of this girl's coming to any mature understanding of her sexuality. But, one may object, children are often attracted to what is harmful to them, and this requires that one watch them carefully lest they play with matches or razor blades. That is true, of course, but in the matter of handicap sexuality deeper questions are at issue. In particular, there is the argument that there is need to separate the danger of becoming pregnant from the need of the handicapped person to have some form of sexual expression. In the language of rights one could argue that, whilst the severely retarded have no right to reproduce, they do have a right to sexual expression without the danger of becoming pregnant. Thus, sterilisation may be a paternalistic expression of the right of the retarded not

to reproduce, while protecting the right to sexual expression.

In relation to both normally developing children and the mentally retarded the paternalism of parents and guardians may be either a help or a hindrance to the welfare of their charges. Sometimes, for instance, the parents' own interests are the primary motivation for limiting the freedom of the retarded minor, even though there may be some justifying reason for protecting the minor from himself or herself. It is natural that parents should be anxious when their children grow to sexual awareness, but are unable to participate in sexuality responsibly. The trauma of pregnancy, and the possibility of having to care for an unwanted child must put some pressure on carers to put into effect a policy of 'better safe than sorry'. And there may be a mixture of motives not readily admitted to, which places a question mark over parental paternalism. (But see Hauerwas,1986:131ff. for words in favour of paternalism.)

It is because of the possibility of paternalistic abuse on the part of those directly involved in caring for the mentally retarded that the paternalistic responsibility is necessarily shared in circumstances such as the cases discussed above. The courts step in as a more objective judge of the minor's best interest, and it may be useful to appoint a lawyer to act as a kind of 'devil's advocate' by presenting different options, which may better represent the retarded individual's interest. Naturally the court must take into account the reality of the patient's position, rather than demanding some unrealisable ideal. For instance, the court must take into account the difficulty of controlling the movements of the handicapped moment by moment in a busy institution or the pressure on parents in a family with other children to look after.

On the other hand, the court should be willing to criticise the lack of proper services in certain situations, which make sterilisation appear necessary for the handicapped. For instance, should staff and parents be given opportunities to learn skills in educating the retarded in the responsible use of their sexuality? Again one should recall the point made earlier, that the mentally retarded make up a very diverse group of different conditions, not all of which are severely debilitating in terms of responsible action. Thus the more disinterested paternalism of the courts may have the special role of reminding parents and institutions that the particular welfare of the individual in their care must not be sacrificed too easily to the interests of the carers, no matter how legitimate those interests are on their own.

The emphasis on legal paternalism as a check on the paternalism of the immediate carers is to be found as well in the American legal system. I refer in particular to the important case brought before the New Jersey Supreme Court, In the Matter of Lee Ann Grady, 426A.2d 467,1981. There are some differences between this case and the case of Jeanette discussed above. For one thing, Lee Ann suffers from Downs Syndrome and was no longer a minor when her case was brought to court. And, one other thing, there was no claim that Lee Ann was sexually aware or showed any interest in sexual contact. The sterilisation was proposed mainly in order to protect her from the full effects of sexual abuse, i.e. pregnancy.

Writing about this case, George Annas (1981) recalls that it was the New Jersey Supreme Court that was responsible for another landmark decision, that of In re Quinlan, which gave permission to the parents of Karen Ann Quinlan to remove what they considered extraordinary or burdensome means in treating their daughter. And Annas suggests that one might expect the court to apply a

similar judgement in the case of Lee Ann Grady. However, this was not the way things turned out. It is worth quoting Annas at some length:

> As in Quinlan, this court sees its task as fashioning a way to preserve the right of choice for incompetent persons. Unlike Quinlan, however, the court refuses to permit the person's parents and a court-appointed guardian to make the decision. Instead it insists that only the court can make this decision for an incompetent.
>
> The court gives two reasons for distinguishing this case from Quinlan. First it sees the alternatives in Quinlan as "much more clear cut": indefinite life in a coma versus natural death.....Second, there was no history of abuse in Quinlan-type decisions. In contrast, many choices are open to Lee Ann Grady; and there is a history of horrible abuses in this area. (Annas,1981:18-19)

Though not very happy with the reference above to the court's interest in preserving 'the right of choice for incompetent persons', since almost by definition the incompetent have no personal choices at the reproductive level, still the message is clear from London to New Jersey: because of past abuses in this area and possible repetitions in future, the legal system must intervene to protect the 'rights' of the incompetent.

7.5 The 'Sexual Rights' of the Retarded.

One may wonder why I should consider the matter of sexual rights at this point. I do so because of the close connection between sexuality and procreation, especially in the Christian tradition. Moreover, it is often felt today that rights to sexual satisfaction are ultimately more important than the right to procreate. In fact, it is sometimes suggested that the right to procreate is purely discretionary and can be waived or relinquished as a means towards enjoying the right to sexual intimacy. Regarding the mentally retarded this point is applied

differently depending on the seriousness of the handicap. Whatever the view of some Christians that sexual intimacy can never be legitimately separated from marriage and at least the possibility of procreation, there is no shortage of secular philosophers who are willing to separate these goods, especially in relation to the mentally retarded. Thus, Robert Neville (1978) has this to say about handicap sexuality:

> Freed from pregnancy, childbearing, and childrearing, an active heterosexual life can enrich the existence of some mildly mentally retarded in much the way it can that of so-called "normals". Other things being equal, mildly mentally retarded people can benefit from and have a right to sexual activity and the social forms sexual relationships can involve, such as marriage. Capacities for marriage and long-lasting affection do not have to be clearly present, however, for the retarded to have a claim on sexual activity for pleasure purposes alone. (Neville,1978:33)

For many people of course this kind of statement is scandalous. Part of the explanation of this response may lie in the theory put forward by Ann Craft (1987), among others. She says that there is a 'general discomfort with the sexuality of individuals with mental handicaps' which stems from contradictory expectations held of them. On the one hand, 'both men and women with mental handicaps are seen as having very strong sexual inclinations, coupled with poor personal control, making them a menace to society at large' (Craft,1987:14). She mentions the scare there is if it is suggested that a hostel for the mentally retarded is to be located in a residential area, with parents worried that their children will be sexually molested (ibid). On the other hand, 'The second belief is linked to the myth that children are asexual until puberty' (ibid.). And since mentally handicapped people remain children whatever their actual age, and since children are not interested in sex, the mentally handicapped should not be interested in sex. But in fact

they are, as many have pointed out (cf. Heshusius, 1987: 35-61; Monat,1982:chs.1 &2; Vanier,1985).

Contradictory beliefs with regard to mental handicap and sexuality may in fact lead to similar behaviour on the part of carers, though the reasons for acting may be different. Thus, if one believes that the handicapped have uncontrollable sexual instincts leading to promiscuous behaviour, then sterilisation may be imposed as a solution to protect the person from herself or himself. On the other hand, if one holds that the mentally handicapped are like children and have no real interest in sexuality, one may again seek to have the person sterilised, but this time to protect the individual from being molested by others. In both cases the last resort solution may be accepted too readily, where the proper response should be a realistic assessment of the individual handicapped person's sexual needs and the level of maturity of the person. In other words, sterilisation may be a way of sweeping handicap sexuality under the carpet, while actually claiming that one is permitting the handicapped person more freedom to participate in human sexual expression.

If it is true that some mentally handicapped people have uncontrolled and uncontrollable urges, what service is being done to a handicapped person by sterilising him or her and then leaving the person free to take advantage of sexuality 'for pleasure purposes alone'? Surely, the first step here is to judge indeed whether the individual's sexuality is uncontrollable or whether it is simply uncontrolled but capable of being controlled. Sterilisation does help to avoid some obvious harm to the person who is not in control, but it leaves untouched the harm a person may do to himself or herself on a deeper level by the exercise of sexuality in an inhuman way. Just because a normal person avoids pregnancy does not imply that the use of sexuality is innocent and painless.

Normal people can be hurt deeply when they abuse their sexual gifts; can the same not be said for the handicapped, other things being equal? (I leave open the question as to whether the handicapped might have the right to solitary sexual satisfaction. Obviously the Christian moral tradition tends to stress the interpersonal basis of human sexuality. But if the capacity for interpersonal relationships is severely limited, the question arises whether masturbation, say, might be morally licit?)

Turning to the other belief which plays down the sexual interests of the handicapped, but which attempts to protect them from sexual predators, one must question the notion of sterilising a person as the solution to this problem. The most common objection to this 'solution' is that sterilisation may in fact encourage others to abuse the mentally handicapped, in the light of the knowledge that the girl will not become pregnant. Again I have to repeat the point just made above: pregnancy is not the only disaster one has to guard against in the care of the handicapped and their sexuality: what is in question is the whole sexual well-being of the person. It is better not to forget the human tendency to seek the easy solution to complex problems, and the tendency of institutions to sacrifice individual welfare on the altar of efficiency. The so-called 'right to sexual expression' of the mentally retarded person is not served by automatically sterilising the person, male or female (cf.Chakraborti,1987:794, who claims that in ten years working with the mentally handicapped she only once recommended sterilisation, and then it was to a mentally handicapped couple with two children.). I argued earlier when discussing the right to rear children that the mentally retarded may have this right, but that its exercise may involve further rights to particular training over and above that received by normal couples. It seems reasonable to argue similarly in the area of

handicap sexuality - they may require further education to participate in the goods which come more easily to the normally developed.

7.6 Application of the Hohfeldian Terms

In the preceding discussion, right from the beginning of this chapter, I have steered a course among various substantive moral issues, taking certain options and rejecting others. My position has been relatively traditional insofar as I have accepted as an ideal an initial right to enter a committed heterosexual relationship, and from this base I moved on to consider the right to found a family. Since the general trend today is to treat the mentally handicapped equitably in relation to the rest of the moral community, I envisage the moderately retarded at least as having the primary human right to marry and in certain situations having the special moral right to found a family (where this involves giving birth to at least one child and raising it to maturity).

The human right to marry is a strict claim-right for the moderately retarded. This can be claimed against the state and against all who would obstruct the freedom of the retarded person to enter the married state. It is a liberty-right with regard to other persons, since no one has an obligation to marry any other person. It is a power-right insofar as any reasonably competent person can change his or her legal and moral relationship from being single to being married. It is an immunity insofar as others suffer from a disability or lack of power to stop the handicapped person from marrying.

The special moral right within a relationship like marriage to attempt to found a family is qualified both for normal couples and handicapped couples. If a couple

cannot afford to have children, or if founding a family might seriously injure the health of either spouse or undermine the relationship, the spouses may have no claim against each other for a time. In fact, there may be a claim against each other not to procreate until the circumstances improve. If this is the case, there is no liberty to procreate, since this is defined as having 'no duty not to' procreate and there is here a duty not to have children. With regard to powers, there would be no power to procreate, since this would entail the moral capacity to change one's relationship to that of parent, and one has a duty not to do this.

For the moderately retarded a cloud of doubt hangs over their right to have children, even if they have the prior right to marry. Depending on the circumstances, the handicapped couple may be allowed to have a single child (so long as they accept help from others in raising it), but no more than this. Or the couple may be advised either not to have children or to have their children fostered. Or there may be no problem at all with permitting the retarded to decide on the number of children they want.

As the type of mental handicap gets more serious in terms of mental incompetence, the paternalistic rationale becomes stronger and the rights of carers, including the state, become more stringent. The claims, liberties, powers and immunities of the handicapped couple (and individuals) become weaker in relation both to marriage and procreation. In cases of total incompetence, there are no reproductive rights, but there are rights relating to the health and welfare of the retarded person which are supposed to give protection against 'accidental' reproduction. Such rights are claims made by proxy. There is no sense in speaking of liberties, since claims are already in place. However, powers and immunities operating by proxy can be of importance, especially when

the legal system makes an incompetent person a ward of court. This entails some immunity from arrangements made for the incompetent person by one set of carers, e.g parents or local authorities.

It seems, then, that the reproductive rights of the retarded grow stronger or weaker along a continuum, depending on the level of mental competence and incompetence. The more competent a person is the closer he or she is to having the claims, liberties, powers and immunities of 'normal' people. The less competent a person is the more limited reproductive rights are, until they are virtually non-existent. In between, the limits placed on the reproductive freedom of the retarded will often be controversial. There are special problems, as I pointed out, regarding the degree of paternalism required to protect the rights of the retarded. It seems to me that the more serious the handicap the stricter the claim-right to paternalistic intervention. In other words, the handicapped person has a strict right to have others make decisions for his or her welfare. However, this gives rise to a whole new set of problems, including the means used to protect the welfare of the incompetent person, and conflicting opinions between carers on the true interests of the person in care. To treat these questions properly one would need to introduce the relevant Hohfeldian distinctions to the relations between the handicapped and their carers.

One can imagine taking other options with regard to the reproductive rights of the retarded, which I have either ignored or rejected. Consider the possible reproductive rights of single retarded persons who have no wish to marry. Or think of homosexual or lesbian individuals and couples who also suffer from retardation of some kind. What sort of claims, liberties, powers, and immunities might they have? On the other hand, imagine taking seriously the alleged 'rights' of future persons,

and ask what claims etc. they might have against their retarded parents or against the present generation for permitting them to procreate. Then try to match these rights with those of the retarded.

7.7 The Christian Context and Contribution.

A The Dignity of the Retarded

I can begin this section by more or less repeating certain points made in the parallel section of the last chapter. First, there should be no expectation that the Christian moral tradition should be in a position to offer particular information on the diagnosis or prognosis of mental states. Christian ethicists will of course be interested in what psychologists and other experts have to say about mental retardation and the potentialities of particular patients, since these 'facts' are basic to moral judgements and conclusions, but it is not their field of study as such. In the same way, the Christian moral theologian cannot judge in some a priori way whether a mentally incompetent person should use contraceptives or be sterilised, insofar as these are medically indicated. Nor is the Christian theologian meant to pontificate on methods of sex education for the retarded, although he should know something about these if he is to make sensible statements about the ability of mentally handicapped persons to participate or not in basic goods. As Richard McCormick states, 'it is true to say that the Judaeo-Christian tradition is much more a value-raiser than an answer-giver' (McCormick,1975:17).

The most basic value underlined by the Judaeo-Christian tradition, according to McCormick, concerns the dignity of the individual person. McCormick cites the Protestant theologian Helmut Thielicke (1964), who speaks of man's 'alien dignity' as follows:

> This "alien dignity" expresses the fact that it is not man's own worth - his value for producing "good works", his functional proficiency, his pragmatic utility - that gives him his dignity, but rather what God has "spent upon him," the sacrificial love which God has invested in him (Dt.7:7f). Therefore this alien dignity actualizes itself at the very point where man's own value has become questionable, the point where his functional value is no longer listed on society's stock market and he is perhaps declared to be "unfit to live" (Thielicke,1964; McCormick,1975:10).

'"Alien dignity"' is synonymous with what I called earlier 'absolute dignity', both referring to a transcendent source. Nothing can take away that dignity in this life. since God never changes his mind about his creation. However, insofar as persons are treated in a pragmatic, utilitarian fashion, the absolute, alien dignity of persons is concealed, by falling back on a relative dignity which is so unsure. With regard to the mentally retarded, this failure to see the absolute dignity of each individual, no matter how severely handicapped, is most serious when the attitude behind it is eugenic (cf.Hauerwas,1986:ch 9 on the question 'Should We Prevent Retardation?). But one must not forget that some forms of paternalism can be equally dismissive of the retarded person's dignity under the guise of 'respectable' moral reasons. Here again the Christian Church must never neglect to point out the mixed motivation behind so many moral decisions and actions. Paternalism may sometimes be self-seeking, and this presumably is why the legal system in certain countries intervenes to provide a further court of appeal in protection of the best interests of the handicapped person.

In my earlier discussion of the distinction between absolute and relative dignity, I insisted that rights are geared towards the protection of the latter. This was argued on the basis of the doctrine that basic goods are

revelation experiences pointing to absolute dignity and ultimate self-worth. If personal rights to basic goods are violated, loss of faith in God and in life can be the result. Can this be applied to the mentally retarded? This is difficult to answer for every case, but I am pretty sure that the moderately retarded can experience a diminishment of their relative dignity when paternalism is imposed without a proper reason. I am not at all clear whether or not the more severely retarded are harmed by paternalistic intervention such as sterilisation; perhaps they have some a-thematic grasp of loss, though they cannot articulate the feeling in any coherent fashion.

B 'Blessed are the Poor'

If the Christian Church has a duty to uphold the relative dignity of mankind as one of the ways in which God reveals himself as the source of absolute dignity, this must apply equally to all human creatures. In fact, the Church must have a special concern for those who seem least in the eyes of the world, due either to their 'natural' lack of talent or due to human injustice which ensures that some people get a 'head-start' in life. In relation to the mentally retarded, it seems to me that they fit in well to this category of the poor and oppressed which The Judaeo-Christian tradition has stressed as specially blessed by God. They are the ones who are 'poor' or 'poor in spirit' according to the synoptic beatitudes. Their poverty involves a recognition of complete dependence on God, for they have nothing of their own to boast of. Not that the poor merely accept their oppressed status without protest. They cry to God for liberation.

What I have just said is of course one of the main themes of Liberation theology. Note how Leonardo Boff (1984) expresses the theological option for the poor:

> The theologian of liberation opts to see social reality from a point of departure in the reality of the poor - opts to analyze processes in the interests of the poor, and to act for liberation in concert with the poor. This is a political decision, for it defines the theologian as a social agent, occupying a determined place in a correlation of social forces: a place on the side of the poor and oppressed. (Boff,1984:48)

As well as being a political and ethical option for the theologian and for the Church as a whole, Boff claims the option for the poor is an 'evangelical definition: in the gospels, the poor are the primary addressees of Jesus's message and constitute the eschatological criterion by which the salvation or perdition of every human being is determined (Matt.25:35-46)' (Boff,ibid.; cf.Sobrino,1984:chs 4&5; Gutierrez,1983).

The mentally retarded share many of the features of the poor of Latin America. It could be argued that not enough resources have been invested in raising the retarded to an educational level which would give them some autonomy. They have sometimes been the subject of a smothering paternalism, which is often well-intentioned but still harmful, and which is sometimes the result of ignorance and prejudice. In the theology of liberation, theologians insist on the importance of the poor liberating themselves, not just becoming the objects of liberation achieved by middle class paternalism. Similarly, one would expect an ethics of liberation directed towards the mentally handicapped to attempt to provide means for this group to work out their own liberation. This should involve the handicapped in voicing their claims on their own behalf, based on their own experience of frustration and injustice. Unfortunately, little can be done to help the severely retarded to claim rights for themselves because of their radical incompetence. However, the Christian moral tradition should be willing to challenge some parents,

guardians, and institutions to recognise their own need for liberation from an over-emphasis on their own interests (including the influence of 'operational' and 'ideological' structures of society) and an inability to see the absolute dignity of the severely retarded in their care.

The insights of liberation theology may be joined to one of the insights grasped by David Jenkins (1975) in speaking of the struggle for human rights as a sharing 'in by Christians as a part of God's warfare on behalf of men and women created in his image and as a part of his judgment on the inhumanities of societies and institutions, including those of the Church.'(op. cit.,p.99). Efforts to respect the rights of individuals and groups, such as the mentally retarded, whose welfare has not usually been a priority in society, may surely be seen as part of God's warfare.

C A Theology of Sexuality for the Mentally Handicapped

It seems to me that a further area where the Church could make a useful contribution to the reproductive freedom of the handicapped, is the development of a theology of sexuality which would apply specifically to the mentally handicapped. Very little work seems to have been done in this area, and often one sees a simplistic application of general principles to the mentally retarded, without reference to their special needs. There are two extremes to be avoided in such an enterprise: on one hand, ignoring special needs and treating handicap sexuality, including reproductive freedom, exactly like that of the normally developed adult; on the other hand, creating a wholly different set of moral standards for the mentally retarded, which sets them apart from everyone else and only serves to discriminate further against the handicapped.

The first extreme might be illustrated by an example from Roman Catholic moral theology, the judgement condemning as illicit direct sterilisation. I need not enter into the detail of the condemnation of sterilisation by the magisterium - such points are covered in standard manuals (cf.Ford & Kelly,1963:ch.15; Healy,1956:ch.6; Peschke,1978:329-333). The kind of sterilisation condemned as illicit by Roman Catholic orthodoxy is contraceptive sterilisation as opposed to therapeutic sterilisation understood in a narrow sense. This is regarded as an evil means because of the intent to avoid conception. Note that not all Catholic moral theologians accept this doctrine; there are some dissenting voices,e.g. Haring,1974:90-91; McCormick,1981: chs. 13 & 14; Curran,1976:ch.6). But their dissent is part of a wider dissent concerning the magisterium's position on contraception as applied to normal married couples. The point at issue here is whether sterilisation is illicit in relation to the retarded.

In particular, when one considers the severely retarded who may need paternalistic protection from the effects of their sexual instincts, one may ask whether sterilisation in such cases is not truly therapeutic, even though the intention is contraceptive. This seems to me to be a case where the moral principle applied to normal couples may not apply to some of the handicapped. The basic reason for this misapplication is that the severely handicapped are not in the position of couples who may selfishly exclude children from their marriage. As Haring puts the point: 'It might be said, then, that the real immorality comes in the irresponsible refusal to fulfil the vocation of husband and wife and father and mother' (Haring,1974:90).

Likewise, in cases of relatively moderate handicap where there is difficulty using 'natural family planning methods', it must be asked if contraceptive intervention

might not be justified because of the limits of the retarded in controlling their reproductive freedom. Of course, one may dissent completely from the Catholic Church's teaching on contraception and sterilisation and thus wonder what all the fuss is about in relation to the handicapped and their sexuality. All I am doing here is to suggest that moral principles accepted as appropriate by the Catholic magisterium should be adapted to the situation of the mentally retarded, and that this move should not necessarily undermine the usual applications of moral principles in the ordinary cases of able-minded persons.

The second extreme which the Christian Church should warn against, lest the reproductive rights of the handicapped be violated, involves placing the mentally retarded in a special moral category which undermines their status as moral agents. Again this may occur if one simply lumps all mentally retarded together in a single group comprised of people considered to be practically amoral. I have in mind here the point made earlier about the right of the handicapped to sexual expression. One of the reasons given for sterilising the retarded is that they can then exercise their right to 'sexual activity for pleasure purposes alone' (cf.Neville,1978:33). Now, Some people may believe that such sexual activity is a right of both the mentally retarded and the normally developed, but the Christian moral tradition is highly suspicious of such an idea, especially if one is talking about the more intimate expressions of sexual love. The danger to be avoided here, I think, is of ignoring the call to responsibility which comes to many of the mentally retarded as well as to the able-minded.

Sterilisation (or any contraceptive intervention) should not be permitted if it is really meant to save people from the effects of irresponsible actions, when the better approach is to lead a person to exercise a

mature self-discipline. If one wants the mentally handicapped person to be as much a member of the moral community as possible, then one must expect them to live up to the same moral standards as able-minded persons. Sure enough this may involve a challenge to the rest of the community to provide specialised moral education for the morally immature, but, arguably, this is the best kind of paternalism there is.

The Christian Church must insist that any right to sexual expression must be seen in the context of responsible intimacy; in helping the handicapped to achieve that intimacy one must not water down the moral requirements unduly, since in doing so one renders the mentally retarded a disservive. The right to sexual expression is part of the moral and legal baggage people carry as members of the moral community, but to cut off that right from basic moral responsibilities surrounding it may only serve to exclude the mentally retarded person from that community.

7.8 Conclusion

I began this chapter mentioning the commonly held belief that the mentally retarded have no right to reproduce, or, better, a right not to reproduce. This belief arises, I think, because people rarely consider the wide variety of conditions which make up this category of persons. The danger here, of course, is that persons suffering only a limited retardation, and who are thus capable of marriage and founding a family, may have their reproductive rights violated.

As with people enjoying normal health and mental competence, one should apply to the mentally retarded the notion of reproductive rights as in first place the right to have children or found a family. The secondary aspect

of reproductive rights must be the right not to have children and to space the number of children the couple decide to have. Those with mental handicap should be treated equitably by the state and by society, and this is not the same as treating these persons equally with the rest of society (cf.Hauerwas,1986:162). This must be obvious, since the handicapped often have special needs. Regarding the right to marry and procreate, the mentally retarded presumably have special rights to that aid which can bring them up to the level of enjoyment of goods which is so often taken for granted by the normally developed.

The key question, then, concerning the reproductive rights of the retarded centres on the degree of paternalism required by these members of the community if they are to maintain their (relative) dignity. I believe that there is a right to paternalistic intervention which becomes stronger as one moves along the continuum towards mental incompetence. But there is also a right that this paternalism be controlled lest it smother any sign of autonomy.

I recognise that my emphasis on paternalism and on the rights of the handicapped in relation to the state and society is just one possible position within the total discussion of the place of the mentally retarded in society. For instance, I have played down the conflict of interests between the retarded who desire to have children and those children seen as 'future persons'. Likewise, I was not keen on stressing the eugenic rationale or the 'burden' of caring for the retarded in society. Such positions are based on particular moral assumptions and Christian values, and I can well understand the controversial nature of my approach in a pluralistic society.

To sum up, I have emphasised how the mentally retarded population are a group of people who need special help if their sexual and reproductive rights are to be respected. Paternalism is often required, but its aim is to create as much autonomy for the handicapped as possible. The rights of the retarded to limited paternalistic intervention involve various levels of protection, each level providing a check on the others. Once again, the Hohfeldian terminology has been shown to be useful in clarifying some of the possible normative relationships which are required if reproductive values are to be claimed for the retarded. As always in discussions of rights, one has to consider the goods involved and the ways in which one can limit the freedom of others in order to achieve some participation in those goods. The Church operates on one level challenging parents, guardians and the legal system, as well as society as a whole, to cherish the rights of the retarded as they must cherish the rights of the weak and poor in their midst.

But it is dangerous to forget that the rights of the mentally handicapped or retarded also represent a challenge to the Christian Church to review the theological principles which may or may not be at the service of respecting those rights. God's warfare against the evil that enslaves men and women takes place on the battleground of 'academic theology' and the 'moral statements'(or lack of them) of the churches, not simply in the homes and institutions where the struggle to 'care' for the retarded goes on. This is the case insofar as the handicapped and their carers look to theologians and 'the Church' for guidance as to God's will in the sphere of the reproductive and sexual freedom of the handicapped.

Chapter 8

Reproductive Rights and Artificial Insemination

8.1 Introduction

I wish to discuss in this chapter a further area of concern with regard to the moral and legal freedom to procreate. In the next few pages I will be interested in Artificial Insemination (AI) primarily as a means used by childless couples to found a family. One must be aware that the procedures involved have wider significance than helping the infertile; for instance, AI may help those who have been alerted to some genetic defect which could be passed on through the male gametes, such that they seek donor sperm to ensure a birth free from deleterious genes possessed by the male spouse. AI may also be used by those with ambitions to have offspring of a particular type. They hope to have children with special talents and thus they choose gametes from a 'superior' male. Clearly, too, AI is in essential relationship of continuity with procedures like IVF and ET insofar as it is the first step in artificial reproduction, separating procreation from the intimacy of sexual intercourse. So the main points at issue in this chapter will be whether one should countenance AI as an appropriate way of procreating children. If it is appropriate morally and legally, should one speak of a right to this means of overcoming infertility? (I shall not discuss the alleged right to use AI for the other reasons besides infertility mentioned above.)

Although I am now discussing a different sphere of interest from those underlined in previous chapters, there is of course some overlap between all three chapters. In particular this overlap has to do with the means allowable in exercising reproductive rights. Thus, while most reasonable persons will agree on the notion of

responsible parenthood, there will be a difference of opinion on the means used to practice this virtue: should sterilisation be permitted or should 'natural family planning' methods be used? Should abortion be part of an attempt to be a responsible parent? If it is agreed by all that some mentally retarded people should not become pregnant for their own sakes as well as for the sake of the children they might procreate, should such persons be sterilised, or given long-term contraception, or simply supervised more closely in institutions, as well as giving time and expertise to education in sexual responsibility? In this chapter on Artificial Insemination the language of rights becomes quite complicated, especially when one considers the problems related to insemination by donor. Most of the discussion will centre on this form of artificial reproduction.

8.2 Artificial Insemination and Infertility.

The extent of infertility is rather hard to assess. However, it is thought that as many as ten per cent of couples suffer from some kind of infertility (Warnock,1985a:8; Snowden & Mitchell,1983:16; Winston, 1987:11, mentions the number 1 in 8 couples). Snowden and Mitchell claim that in one third of these cases the infertility will be due to some defect in the male. 'This indicates an incidence of about 16,000 marriages a year which will be infertile because of the husband. The Peel Report (1973) estimated that some 10 per cent of these couples (1,600) may consider AID at sometime during their marriage (Snowden & Mitchell,1983:16). These of course are the estimated figures for Britain, but one can assume that relatively similar figures will appear around the developed world where AI is more readily available.

The major cause of male infertility is sperm defects or dysfunction (cf. Hull,1986:24-35). Men may suffer

ogliospermia (a decreased number of sperm cells) or from aspermia (the absence of sperm). In the case of ogliospermia AIH may be appropriate to achieve conception. This usually involves building up semen and assisting it on its way (Boyd,Callaghan,Shotter,1986:65). Where aspermia is in question only AID can be of service.

8.3 Attitudes towards Artificial Insemination.

If one holds the point of view that there is a right to do wrong in certain situations, then one may perhaps hold that persons have a right to AI even if it is a wrong means to achieve a good end. However, it is more satisfactory from the moral point of view to establish AI as a licit means to a good end. The right to do wrong should be exceptional. So, what are the arguments commonly put forward for and against AI in human beings?

A Secular Attitudes: The Warnock Report

In favour of AI in general are those who emphasise the great pain suffered by infertile or childless couples, against which must be balanced the bad effects of using either AIH or AID. Mary Warnock (1985a) , for instance, underlines the distress of childless people:

> For those who long for children, the realisation that they are unable to found a family can be shattering. It can disrupt their picture of the whole of their future lives. They may feel that they will be unable to fulfil their own and other people's expectations. They may feel themselves excluded from a whole range of human activity and particularly the activities of their child-rearing contemporaries. In addition to social pressures to have children there is, for many, a powerful urge to perpetuate their genes through a new generation. This desire cannot be assuaged by adoption. (Warnock,1985a:8-9)

The Warnock Report was not interested in the debate as to whether the desire for children was biological or psychological, a deep instinct or a result of social pressure. There is a utilitarian flavour to the Report in as much as it concentrates on the pain and frustration of individual childless couples and the need to overcome this (cf.Lockwood,1985:170-173; Mahoney,1984a:288). If the means of overcoming infertility lead to less pain or frustration than the ongoing pain and frustration of childlessness, then such means are morally justified. With regard to AIH, the Report could find no justification for regarding this as an illicit means either morally or legally, though it did express grave reservations about the posthumous use of a man's semen by his widow. The reason for this reservation was typically consequentialist, i.e. 'the profound psychological problems for the child and the mother' (Warnock,1985a:18).

Regarding AID the Warnock Report recognised that there were stronger reasons for rejecting this as an illicit means of overcoming infertility. But the members of the group were generally in favour of AID once it was controlled by law and surrounded by certain safeguards. A good summary of the Report's attitude towards AID is given by Boyd, Callaghan and Shotter:

> Considering arguments against AID, the Warnock Committee noted that the law did not equate AID with adultery and that AID lacked the personal relationship involved in adultery. The husband's consent to AID, moreover, suggested 'a mark of stability in a marriage'. The donor, as a third party, the Committee believed, did not necessarily threaten the exclusive marital relationship. Harmful tensions might subsequently build up between the couple, or the child might be harmed if he accidentally discovered his origins: but the kind of problems involved existed and often had been overcome in the analogous experiences of step-parenthood and adoption. The risk of a donor passing on a harmful genetic condition could be minimised by limiting the number of donations from any one donor.

> Against all these objections (as well as against fears about the imponderable consequences of AID for the family and society generally), the Committee believed, there had to be set the fact that AID was a simple, painless and 'not particularly invasive' way of helping a couple to have 'a very much wanted child' whom they could 'bring up as their own ' and who was 'biologically the wife's. A further, no less important consideration, the Committee added, was that 'the practice of AID will continue to grow, with or without official sanction and its clandestine practice could be very harmful. (op.cit.,68; Warnock,1985a:18-28).

The Warnock Report, if it is representative of informed public opinion, reveals a change of attitude from the findings of the Feversham Committee published in 1960. That Committee accepted as licit AIH when medically indicated, but decided that AID was not acceptable, and in saying so believed it reflected public and medical opinion. The members of the Committee did not consider the legal banning of the procedure necessary, but they accepted that the legal status of children born of AID was that of illegitimacy. To enter the husband in the register as father of the child was furthermore the commission of an offence under the terms of the Perjury Act (1911).

Opinion was changing, however, and by 1968 the British government decided to make both AIH and AID available under the NHS if medically indicated. The Peel Report in 1973 suggested that the NHS centres offering AID should be accredited, but this was not implemented. Boyd et al. suggest that this is due to the ongoing falsification of records in order to avoid the stigma of illegitimacy. This has also had the unfortunate effect of maintaining a cloud of secrecy around the practice of AID, including the short and long-term effects of the procedure on children and their families.

B Christian Attitudes

What about the attitude towards Artificial Insemination within the Christian tradition? As in other areas of sexual morality and reproductive rights the Christian community is divided on the moral status of AI. Again, the diversity of opinion is not simply one of Roman Catholic conservatism against Protestant liberalism. For instance, up to relatively recently some Roman Catholics in good standing were moving away from the condemnation of AIH by The Holy Office (1897) and the statements by Pope Pius X11 in 1949, 1951, and 1956. Thus, Bernard Haring (1974) claims that the Pope's statement of 1949 (AAS,41,557ff.) was less explicit about AIH than on the question of AID, and he concludes that

> When the sperm comes from the husband and the whole marriage is lived in a climate of love, then not only is he biologically the father but there is not that total severance between the unitive and the procreative meaning of marriage.....Voluntary (directly intended) ejaculation for well justified diagnostic aims therefore does not constitute ipsation (op.cit.,92).

Richard McCormick (1981), while accepting that procreation should generally be achieved through sexual intercourse admits that, 'if AIH is not a substitute for sexual intercourse, but in relatively rare cases its complement, the reasoning would not seem to support the absolute prohibition' (McCormick,1981:317; Peschke,1978: 479-481; Lobo,1985:260-263).

In relation to AID, however, there is a fair degree of agreement both within Roman Catholic moral theology and among some Protestant ethicists on rejecting this as the appropriate means to found a family. Among the dissenting voices from this wide consensus are Joseph Fletcher (1971) and John C. Fletcher (1986); and on the Catholic side (with reservations) Charles Curran.

The most extreme justification of AID from a theological point of view comes from Joseph Fletcher (1971). Some of his remarks in this area have received a certain notoriety over time. Take these words for instance, 'Man is a maker and a selector and a designer, and the more rationally contrived and deliberate anything is, the more human it is' (Fletcher,1971:781; McCormick,1981:283-284). Since AIH and AID are prime examples of the application of reason to procreation, they must be acceptable, seems to be Fletcher's conclusion. It is the opposite extreme from the view that procreation must not be transferred from the intimacy of married life to the laboratory.

In a recent article on 'Reproductive Technologies' John Fletcher reviews some of the theological positions on AID. He rejects both principled and consequentialist forms of opposition to AID and accepts the procedure as licit 'provided there is informed consent by the husband and safeguards for the recipient and the donor' (Fletcher,1986:537). Unfortunately, he gives no positive reasons for accepting AID from a theological point of view.

Charles Curran gives as his opinion:

> In general I give weight to the argument from the meaning of the marriage covenant and from the fact that the child is the fruit of the love and the bodies of husband and wife. However, I do not believe that these reasons constitute an absolute prohibition against AID. There are strong reasons to counsel against an easy acceptance of AID...In my judgment adoption is to be preferred. However, I cannot exclude the possibility that AID could be a morally good choice in some circumstances despite serious problems that are present (Curran,1982:123)

When it comes to official statements of mainline Churches in the Christian moral tradition, I have already noted the Roman Catholic opposition to both AIH and AID.

Protestant Churches, on the other hand, tend to have little objection to AIH, while remaining ambivalent about AID.

In the Church of England, Board of Social Responsibility Report, Personal Origins (1985), the members of the Committee had to agree to differ on the moral status of AID:

> There are two different points of view held among us. One is that if donation takes place within a stable marital relationship, it still has the status of a good, though not, of course, one which should become the norm; the other believes that the perils to marriage as understood by Christians, are so grave that the extension of gamete-donation should be strongly discouraged, and AID dislodged from the established position it holds among the techniques of aided fertilisation (Personal Origins,1985:39)

The other major Report, from the Free Church Federal Council and the British Council of Churches, entitled Choices in Childlessness (1982),shows a disagreement on the value of AID as the following quotation indicates:

> Some of us from the outset took the view, from which no further argument or reflection dislodged us, that there is a specifically Christian objection to the practice of AID. This rested on the conviction that marriage is a covenant-relationship between husband and wife exclusive of al others, not only in sexual intercourse, but also in the procreation of children. If there is going to be a child by one, then so long as the covenant relationship endures, it shall be a child by both; if it is not to be by both, then it shall be by neither. This is part of the meaning of marriage "for better, for worse".
>
> Others of us took the view that the full and informed consent to AID of both husband and wife materially altered the case. Such consent cannot in principle be invalidated by the existence of a covenant-relationship. It can be incorporated within the covenant and may in certain circumstances support and even strengthen it. (Choices,1982:43)

The Social Responsibility Board of the Church of Scotland, in its response to the Warnock Report in 1985, found AIH acceptable, but objected to AID, especially to 'the unwarranted intrusion of a third party in the marriage relationship' (Boyd, Callaghan & Shotter, I986: 91-92). This was accepted by the General Assembly of the Church in 1985. Nor was the Kirk happy with Warnock's attitude towards the responsibility of the donor, nor with some of the legal aspects of AID.

In general the Christian arguments in favour of AID must rely on the notion of stewardship over creation together with the notion of vocation to parenthood within marriage. I have already pointed out the goods involved in being a parent, especially with regard to the intimacy between the spouses and the revelation-experience with which child-birth and raising a family can provide the partners, namely of living within a gracious Mystery. However, a question mark hangs over AID in particular, as to whether the intimacy of marriage is shattered by the intrusion of a third party at the genetic level, even if there is no sexual relationship at a personal level. Furthermore, there must be some moral limits to the exercise of the vocation to parenthood, since God does not call persons to a way of life if the means of achieving that state are morally wrong. Thus, it lies open to the Christian moral tradition to claim that parenthood by means of AID is not justified under the title 'vocation'.

In the last few pages of this discussion of some positions favourable to AID and AIH to some extent, I could not help mentioning the opposing attitudes in the process. Let me now rehearse those objections to AI in general, and to AID in particular.

C Analysis of the Objections

The most general objection which is said to apply to both kinds of artificial insemination is that they are 'unnatural'. Now this word is problematic. If it simply means a procedure which departs from the normal course of events, then one has to distinguish normal occurrences which are good from those that are bad. One could argue that selfishness and pride (and a host of related vices) are normal to humans, yet Christianity preaches that men and women should do all in their power to deviate from such a 'norm'. Clearly then one has to distinguish between what is natural and what is normal, so they cannot be equated in any simple way. If one is opposed to tampering with nature in specific areas, such as health care, then one may have to explain why one is in favour of operations to save people from premature (yet 'natural') death while being opposed to AI which helps couples to procreate when nature 'breaks down', so to speak.

To make any sense of this objection one has to show that 'the cure is worse than the disease',i.e. that human efforts to make up for nature's 'faults' end up making things worse. Or one can argue that some natural processes are so special that God has given a specific command limiting human stewardship in such cases. Both arguments mentioned above can be used to support the notion that 'unnatural acts' are morally wrong. The best known approach here is the strict Roman Catholic one which stresses the inseparability of certain related goods, for instance sexual love and procreation. Thus when 'nature' breaks down in the case of infertility, the means used to remedy this defect must be 'natural' in the sense of holding together the unitive and procreative goods of marriage. Therefore, while surgery to unblock fallopian tubes and AI are in one sense equally 'artificial' ways of remedying infertility, according to

this point of view, only the latter is 'unnatural' and therefore morally wrong. Note that this is not a tautological argument; it is not a matter of defining morally right as the natural way, but of pointing out how the natural way is conducive to human flourishing.

A clear statement of this whole approach is found in this quotation from Pius X11 in 1951:

> To reduce the cohabitation of married persons and the conjugal act to a mere organic function for the transmission of the germ of life would be to convert the domestic hearth, sanctuary of the family, into nothing more than a biological laboratory....The conjugal act as it is planned and willed by nature, implies a personal cooperation, the right to which the parties have mutually conferred on each other in contracting marriage. (Pius XII,AAS 43(1951)850; McCormick,1981:316).

The opposition of the Church's moral tradition to masturbation is a further element in its opposition to an 'unnatural' procedure in the sphere of sexual ethics. True enough masturbation is declared a wrong activity because it often involves the encouragement of sexual fantasies, which may amount to fornication or adultery in the heart (cf.May,1977:50); but it is primarily condemned in Catholic tradition, I think, because human sexuality is supposed to be relational and open to new life. Some may argue in favour of masturbation in relation to AIH especially, that the intention is relational and open to life, but the magisterial teaching of the Roman Church will only accept the achievement of new life through sexual intercourse, even if that intercourse has to be assisted in some way (cf. Boyd,Callaghan,& Shotter, 1986: 80-81 on the subject of 'Assisted Insemination', and detailed discussion by Kelly,1950:14-22).

On this view of what is 'unnatural' there is no need to go further in distinguishing AIH from AID. However, AID is said to involve a further reason for objecting to

AI: as mentioned already, it involves the intrusion of a third party into the intimacy of the marriage relationship. For those who do not hold as valid the Roman Catholic view of the 'unnatural' status of AI this argument is more substantial. I pointed out that those in favour of AID argued strenuously against the notion that it involves adultery, since sexual intercourse does not take place between the woman and the donor. (Similar arguments are made against using the term 'prostitution' for surrogate motherhood; but cf.the Scottish case of MacLennan v MacLennan, 1958 SC 105, for refusal to see AID as adultery). But there may be no need to criticise AID as adultery if there are other reasons for objecting to the intrusion of a third party in the marriage relationship. It could be argued for instance that the very nature of marriage requires that procreation comes about from the direct personal cooperation of the couple, such that if one spouse, in this case the husband, is infertile, the misfortune must be shared by both partners rather than involving the fertility of an anonymous donor.

The principle behind this position is enunciated by McCormick as follows, 'First, and above all, it violates the marriage covenant wherein exclusive, nontransferable, inalienable rights to each other's bodies and generative acts are exchanged by the spouses' (McCormick,1981:312-313). Note here the language of rights and the distinction beteen the right to the body of the partner and the right to generative acts with one's partner. The former right is not violated, since AID does not involve adultery in the usual sense; but the latter right - to generative acts - is violated, if one considers the marriage covenant as prohibiting any partner from allowing a third party access, even indirectly, to either partner's generative faculty. Too much stress can be placed on the absence of sexual intercourse, whereby it is largely overlooked that the donor is present in every

cell of the child carried by the mother. Of course one may still agree that there is a right to the generative acts and faculties of another within marriage, while allowing for the power to waive or alienate this right in some circumstances. I take it that this is close to the position of those who accept AID when both spouses give their informed consent to the procedure - they simply waive their rights for the sake of achieving pregnancy. What remains to be discussed is whether in fact couples have the power to waive such rights. In the quotation from McCormick above note how he used the terms 'non-transferable' and 'inalienable' to qualify the right to found a family with one's marriage partner alone.

The discussion so far has concentrated on the more 'principled' objections to AI, and especially to AID. By 'principled' I mean an approach which looks straight at the rightness or wrongness of an act or procedure in itself. It is usually associated with a deontological approach to ethics as opposed to a consequentialist approach. Mary Warnock recognises this distinction when she says in the foreword of her Report that, 'Moral questions, such as those with which we have been concerned are, by definition, questions that involve not only a calculation of consequences, but also strong sentiments with regard to the nature of the proposed activities themselves' (Warnock,1985a:2). Remember, too, one of the positions held by some of the members of the Choices in Childlessness Report - 'Some of us from the outset took the view, from which no further argument or reflection dislodged us, that there is a specifically Christian objection to the practice of AID' (Choices,1982:9). So there are some positions underlying the use of the language of rights which are not easily debated rationally precisely because one comes to ultimate value positions very quickly, and such positions cannot be susceptible of proof. This is not to say that the principles held so dearly by Christians are false,

but that they will probably appeal only to those with similar intuitions and values. But then how is one going to go about getting others to respect these rights; how will one positivise them or put them into law?

In my opinion the principled approach works well enough in societies that are characterised by great stability and consensus, where there is no move towards moral pluralism. However, in a more pluralistic society the Christian moral tradition needs to relate its principles to a more consequentialist type of moral methodology. One expects Christian principles in the area of marriage and sexuality to fit in realistically with everyday experience (cf. G.J.Hughes,1978:37, where he declares that 'An ethical theory which exhibited as false a large number of the ethical beliefs people held as true would simply fail as an adequate theory.'). If one is intent on pointing out the damage which AI does to human welfare, especially to the marriage relationship, should it not be possible to show the bad effects of practising AIH or AID. Let me take a few examples of consequentialist analysis of AID.

In his discussion of AID, John Mahoney (1984b) makes the following remarks:

> Much is also made of the resultant stress between husband and wife when a child who ideally should be the fruit and the physical embodiment of their love and union can constitute rather a perpetual reproach of personal inadequacy. It should be noted, however, that if attention is concentrated on this evidence alone, as the harmful personal and inpersonal consequences which are predicted as the inevitable result of donor contribution, then such consequences are in principle verifiable by follow-up studies of families which are the result of such procedures. It might, for instance, turn out that not all marital and parental relationships are undermined in such cases. (Mahoney,1984b:18)

Mahoney points out in passing here, that if one objects

to AID because of the 'biological and relational imbalance between the genetic parent and the social parent' then one may find a parallel situation in some cases of second marriages, where a man becomes step-father to the children from his wife's previous marriage. And he warns against accepting the common belief that all relationships between children and their step-parents are characterised by cruelty and lack of harmony. (There are of course differences between the situations: the social father is usually one who gives consent to AID for his wife and accompanies her through pregnancy, so that a closer relationship with the child is made possible right from the start. There is also the fact that children of a previous marriage are often the fruit of intimate sexual love and so are a reminder of a previous relationship, whereas AID involves no such personal relationship with the donor).

Common sense would seem to suggest that AID will damage a marriage if one partner puts pressure on another to accept AID, or if outside pressures, e.g. family, push a person or couple into accepting the procedure. Resentment and anger may follow upon this kind of pressure. Perhaps worse still, any child thus procreated may become a symbol of the unsatisfactory situation and a reminder of the pressure imposed on the couple. Likewise, if a couple freely initiate the process of seeking a child by AID and have come to terms with it in their relationship, common sense would suggest that the joy of having a child will amply compensate for any tension arising in the relationship.

But, one may object, 'common sense' is one thing, but what about the facts? Is there any survey of AID families which will give statistical evidence of the harmful effects or otherwise of AID? Unfortunately, the social scientific evidence is not very clear, one reason being that AI is largely unregulated in any centralised form. A

great deal of confidentiality or secrecy surrounds the process, and one can understand how many couples do not wish any follow-up into the matter. In fact, any follow-up may do damage to the precarious balance of joy and guilt which an AID child may bring to a couple. Asking probing questions may simply open up old wounds. Snowden and Mitchell (1983) stress the ambiguous nature of the reports on the effects of AID:

> Almost all published reports describing AID conclude that 'the emotional and psychological problems within marriages where AID children have been born are few' (Rubin, 1965). Indeed some go further and argue that such marriages are improved and enriched (Jackson and Richardson,1977). It is interesting to note that most of those who publish these positive statements are AI practitioners themselves. ...It is usually left to psychiatrists or departmental committees to argue that AID leads to severe disturbance in family relationships (Gerstel,1963) or to raise other doubts about the procedure (Feversham Committee, 1960). When considering the effect on wife and husband both those in favour of AID and those against it stress the biased nature of the information collected by their opponents. The AI practitioner will only obtain information from 'satisfied' customers and the psychiatrist only sees those who are suffering psychological stress. (Snowden & Mitchell,1983:46)

An interesting report on AID from the U.S. is that of M. Curie-Cohen, L. Lutttrell, and S. Shapiro (1979). George Annas (1979) describes the findings of this report and comments on them. His main conclusion is that,

> The results are disturbing. Besides pointing to a general lack of standards and the growing use of AID for husbands with genetic defects and for single women, the findings tend to indicate that current practices are based primarily on protecting the best interests of the sperm donor rather than those of the recipient or resultant child. (Annas,1979:14).

In particular the Curie-Cohen survey worries Annas in two specific areas. First, the area of donor selection, where the survey found that 80 per cent of all AI

practitioners use medical students and hospital residents as donors. Annas interprets this as a sign of conscious or unconscious eugenics, with doctors wishing to perpetuate the genes of their group in the world. Further, the study showed that doctors in selecting donors 'made many erroneous and inconsistent decisions' (ibid.,15). In second place, there was the area of record-keeping. Annas mentions that,

> While the Curie-Cohen survey found that 93 per cent of physicians kept permanent records on recipients, only 37 per cent kept permanent records on children born after AID and only 30 per cent kept any permanent records on donors. (ibid.)

With so few physicians keeping a strict record concerning donors, the children of the AID process are clearly at a disadvantage as regards the identity of their genetic father. In an age when genetic counselling is becoming more important, it seems to be a form of discrimination against children born of AID that vital information be kept from them. As Annas puts it:

> ...if no records are kept the child will never, under any circumstances, be able to determine its genetic father. Since we do not know what the consequences of this will be, it cannot be said that destroying this information is in the best interests of the child. The most that can be said for such a policy is that it is in the best interests of the donor. But this is simply not good enough. The donor has a choice in the matter, the child has none. The donor and physician can take steps to guard their own interests, the child cannot. (ibid.).

These worries with regard to the best interests of AID children were accepted as valid by the Warnock Report. In response, that Report recommended 'that on reaching the age of eighteen the child should have access to the basic information about the donor's ethnic origin and genetic health and that legislation be enacted to provide the right of access to this' (Warnock,1985a:24-25). Note that

the AID child is said to have the right to know basic genetic information, but not the actual identity of the genetic father. AID children are not seen as being in an identical situation to adopted children.

The Warnock Report was able to recognise the general drawbacks of maintaining AID as a family secret:

> This secrecy amounts to more than a desire for confidentiality and privacy, for the couple may deceive their family and friends, and often the child as well...However the sense that a secret exists may undermine the whole network of family relationships. AID children may feel obscurely that they are being deceived by their parents, that they are in some way different from their peers, and that the men whom they regard as their fathers are not their real fathers. We have little evidence on which to judge this. But it would seem probable that the impact on children of learning by accident that they were born as a result of AID would be harmful - just as it would be if they learned by accident that they were adopted or illegitimate (ibid.,21).

The argument against shrouding AID in secrecy is one which straddles the distinction between principled and consequentialist approaches to the practice. On principle, it seems unjust to 'live a lie' by not mentioning something which may be regarded as central to an individual's well-being - knowledge of his or her full personal history. If it is important to know this then there is an argument for a prima facie right to such knowledge; if such knowledge is unimportant, then why cover it up with implicit lies? Surely if the lie is discovered this would do more harm than telling something which is relatively unimportant (cf. Bok,1978:ch 14 for a fine discussion of 'Paternalistic Lies'). From the consequentialist point of view, experience does tend to show the pain that follows from the living of untruths in an intimate context. The more others are loved and trusted, the more one counts on their honesty in personal relationships. In fact, it seems most likely that recog-

nition of the bad effects of telling untruths is the very basis of the moral principle forbidding this as a vice. One should note, however, as Warnock does, that the objection to AID on the basis of the secrecy it tends to encourage, does not establish that AID is itself necessarily damaging, only that the practice needs to be pruned of some of its unhelpful aspects. This has to be done to achieve a proper balance of rights between all parties - recipients, donors, and children.

8.4 Artificial Insemination and the Language of Rights,

I have stressed throughout this work that rights-language functions in first place to protect human participation in certain goods. So attention is drawn at once to the good itself and its relative importance in the life of each person. But then further attention must be drawn to the way in which others can be obliged to respect this participation, in particular the correlative duties which derive from these rights. Can I expect others to limit their own freedom of action by coming to my aid, or is it sufficient that they refrain from acting in a way that would hinder my good?

Regarding the good of procreation, I have assumed in this thesis that this good should be enjoyed only within marriage (or at least through some stable and continuous heterosexual relationship). I believe that there are good natural law reasons as well as specifically Christian reasons for accepting this assumption. In this particular chapter, however, I have concentrated on the means used to achieve pregnancy and found a family, and have noted the controversy surrounding Artificial Insemination as a means. How does the language of rights apply to this connection between the procreative end and the procreative means?

A Claims and liberties

First, I will assume that AI (both AIH and AID) presents no immediate moral problem for a couple. In other words, for the sake of argument I assume that AI is a licit means to achieve procreation. How then can one characterise the rights of a childless couple in this matter? The answer depends on the normative relationship one thinks exists between a couple suffering in this way and those in a position to help. My general position so far has been that individuals have a human right against the state and society to enter into a committed relationship with a view to founding a family. That relationship, in turn, involves special moral rights whereby the partners have a general claim-right against each other to attempt to have children at an appropriate time. Whether the right of the partners to have children is a claim or a liberty depends on the terms of the marriage contract or covenant. Here I am following the Christian tradition which holds that it is a duty of marriage, other things being equal, not to eliminate the possibility of having children, but to actually attempt to found a family at some time. (Note the discussion of voluntary childlessness in Choices in Childlessness, page 12, and the traditional Christian response in A,1,b, page 52) In other words, I am saying that procreation is a mandatory right, not merely a discretionary one.

Secondarily, there is a claim-right against the state not to interfere in this decision to procreate. This claim-right also entails an entitlement to some positive help from the state (in its health service) in terms of general maternity care before and after birth. (Clearly such a right may be of the 'manifesto' type in many parts of the world.)

Regarding AI as a means of founding a family, if one assumes that this method is licit there is at least a

liberty-right on the part of the couple to take advantage of this means i.e they have no duty not to benefit from this means. It would be a further question, however, as to the claims that the couple could exercise. With regard to AIH, for instance, there should be a strong argument for a claim-right against the state in the person of its health service, depending on the medical resources needed to assist subfertile men. I presume that AIH imposes less of a drain on resources than AID, and that both kinds of AI are not as expensive as in vitro fertilisation. Regarding AID, one would expect this practice to be relatively costly if used properly; for instance, consider the cost of genetic and psychological counselling for the recipient couple. So, even if AI is to be regarded as a licit means to achieve procreation, its status as a claim-right against the state depends very much on the strength of competing claims on the health service on the part of other citizens.

There is a further question here which concerns the category into which one places the right of infertile persons against the state. Is this a reproductive right or a health right or both? In my opinion the rights involved here have a place in both categories. If a person were infertile and at the same time showed no interest in founding a family, the fact that his or her reproductive system was diseased might be irrelevant to the person. Any right to treatment might easily have to give way to the more pressing medical needs of others. Overcoming infertility is a relevant right for those who wish the option of founding a family. In fact, the desire to have a child may contribute to the situation of ill-health, especially at the psychological level. A general point can be developed here: that health is most often sought in order to enjoy goods or values which require health as a basic condition. Thus, the level of health one requires depends often on what one wants to do, whether it be to run marathons or have babies.

For those who want children, infertility is a serious medical condition, and both state and society need to recognise this insofar as there is some duty to alleviate distress within the community. Moreover, it is arguable that the rights of the infertile here are of the status of claims in the technical sense, since the infertile form one of the groups in society whose pain has not received much practical sympathy in terms of medical resources. In other words, rights against the state regarding reproductive freedom appear to be stronger as one moves from healthy couples who need little help from the state to those who are 'handicapped' in various ways in relation to their capacity to procreate.

Obviously, too, the claim-right against the health services for AID does not include a strict claim-right against others to act as donors. Because it is not morally obligatory for a couple to refrain from using AID, and because there is some claim-right against the health services of the state to provide the possibility of AID, this does not mean that men have a duty to provide sperm. It seems to me that this practice of giving sperm, assuming it to be morally licit, would be an act of beneficence rather than an act of justice. Thus, the claim-right against the state assumes the presence of voluntary donors in this situation.

B Powers and Immunities

If there is a claim-right against the state in relation to provision of AID services, it may still only mean that a childless couple have a claim-right to be 'considered' for AID. This is a controversial point, since it centres on the power of the medical service to judge the competence and suitability of couples for the reception of AID. This is somewhat unusual, since society is usually loathe to prevent couples from having children, unless they are mentally incompetent. Now this kind of

incompetence may be a criterion used by AI practitioners, but it may be one of many, the others being an assembly of rather controversial value judgements, on the basis of which a couple may be permitted or forbidden to procreate. According to present practice, it seems that the criteria used to judge recipients as well as donors may vary from practitioner to practitioner and this may amount to the violation of the rights of particularly vulnerable people. (Suggested criteria for accepting both recipients and donors are found in Snowden & Mitchell,1981:54ff,64)

Mary Warnock (1985b) is one person who thinks that doctors should not take this role of judge of parental competence on themselves. She discusses the part played by 'counselling' in the process of deciding who is to be given AI and who is to be excluded. It is clear that some of this 'counselling' is a polite way of referring to medical paternalism:

> For all the claim that counselling is essentially value-free, I doubt whether it can occur without some message being picked up, perhaps mistakenly, by the subject of the counselling, that one course of action ought to be preferred to another. I have heard a doctor claim that he always counsels those who come to him for a cure for infertility; and he often counsels them until they go away. Certainly, if doctors have to decide which couples to treat, which not, they are embarking on a course which is miles away from 'medical ethics', but essentially discriminatory, and discriminatory on social or moral grounds. (Warnock,1985b;148)

In a liberal society the interference in personal choice on the part of professional groups is regarded with some suspicion, but one can hardly expect a complete laissez-faire attitude on the part of the medical profession in relation to a procedure which they have developed and which they need to monitor. Granted that medical staff do not have a monopoly of moral wisdom as well as medical expertise, it is certain that they have a

vital part to play in discerning the proper use of the techniques in their hands. One must be careful of moving from one extreme where 'doctor knows best - leave it in his safe hands', to the other extreme where the doctor simply serves the patient as 'customer' and where 'the customer is always right'. The doctor has to attain a balance between manipulating patients and standing aloof from their moral and spiritual predicaments. The Christian doctor, in particular, will recognise the privileged position he is in to show forth Gospel values by word and example.

Warnock, too, in spite of her reservations about the value judgements of medical staff regarding parental competence, accepts that some judgements of value have to be made, and suggests that some common criteria for judging recipients for AID should be established in order to avoid idiosyncratic, personal criteria being foisted on individual couples (Warnock,1985b:148). If common criteria for judging AID recipients were established by some centralised licensing body, couples might then have strict claim-rights not to be discriminated against on the basis of criteria not included in the established list, e.g. on the basis of race, religion, political allegiance, and so forth. One would expect, however, some controversy regarding certain criteria for refusing AID to some childless persons, e.g. single persons, homosexuals, lesbians. Again, the opposition to such parties receiving AID could be a matter of principle, or an appeal to consequences, or a mixture of both. (For a discussion of some of these issues,see 'Case Conference: Lesbian Couples:should help extend to AID?' in JME,1978,4:91-95; Golombok & Rust,1986).

From the point of view of the technical language of rights, what is in question here is a conflict of powers. I said that a power-right implies an ethical capacity to enter or change a relationship with some other person.

Within marriage the normal couple have the ethical capacity to make each other a parent. Usually this involves an immunity-right against others, cutting off interference in the process of establishing or changing a relationship. These types of rights have been noted already with regard to the intervention of the state in couples' decisions concerning family size, and in the case of paternalism towards the mentally retarded. In this situation pertaining to the childless seeking AID, the discussion above has centred on the notion that AI practitioners (and/or the state) may have a power-right to judge which couples will be permitted to attempt procreation by this means. In question, then, is whether some external authority can impose itself on a marriage relationship and limit the couple's power-right to become parents.

C Mandatory and Discretionary Rights

If there were no moral problems associated with AI in itself, would the right to AI be 'mandatory' or 'discretionary'? I mentioned that one point of view on marriage states that couples have a strict duty to found a family, other things being equal; thus the right to have children and the duty to have children are perfectly coincidental - this is the definition of a 'mandatory right'. On the other hand, there is the position which regards founding a family as essentially separate from the decision to marry. According to this viewpoint, having children is left to the couple's own discretion. The couple have no duty not to have children, but at the same time no positive duty to have children; this is the meaning of 'discretionary right'. Presumably, the couple who see procreation as a discretionary right will view AI in the same light if there are no moral objections to AI as such.

But what of the position of the couple who believe

that procreation is a mandatory right? Are they obliged to take advantage of AI, assuming there are no moral objections to it as such? I do not want to discuss this in detail. I just wish to point out that AIH or AID may be regarded by some people as morally licit but personally distasteful or burdensome. Thus in some cases, one may be able to envisage a couple not wishing to take advantage of AI for reasons that pertain to the feelings of the other partner rather than to objections in principle to the procedure. Arguably, AI could be seen as an extraordinary means (in the sense of being burdensome) which a couple would not be obliged to use to achieve pregnancy.

D The Rights of Conscience

I noted above that one moral position may see no objection to AI as such, while recognising certain moral problems at times in relation to the competence of recipients and the problem of scarce resources. What happens if there is a difference of opinion on the moral status of AI, either AIH or AID, between, say, husband and wife? Does a woman have a right to have a child by means of AI if her husband has moral objections to the practice? Does a husband have a right to found a family in this way if his wife objects morally? In my opinion where there is a conflict between a person who in conscience recognises a strict obligation not to do X or to cooperate in doing X, and another person who sees X as permissible, but not obligatory, the negative obligation takes precedence. In this case the partner who wants a child, but does not see procreation as an obligation, must respect the conscience of the partner who sees procreation by AI as an immoral means to a good end. It is a more difficult question to arbitrate between partners who agree that procreation is a mandatory right while disagreeing on the liceity of AI as a means. (In any case, it may be argued that the existence of a basic

conflict of interests among spouses should automatically eliminate them from consideration for the reception of AI.)

Following Wellman's translation of the Hohfeldian legal distinctions to the ethical sphere, it could be said that the right to do something which one's conscience discerns as permissible is a basic claim-right - others have a correlative duty to respect one's conscientious decisions within limits. However, in a relationship such as marriage, which in itself is established as an institution based on special moral rights, one has to consider as well the conscience of one's partner.

Now apply this to the situation where one of the partners in a marriage relationship wants to exercise the power to become a parent by means of AI, and puts this to the other partner. And let me assume that the second partner objects to the exercise of such a power on the grounds of a conscientious decision which holds that it would be wrong to procreate by this means. Then I feel the conflict must be solved in favour of the claim of conscience instead of the power-right - the former 'trumps' the latter. Regarding the status of the relationship between the spouses the claims of conscience give the dissenting spouse an immunity-right against the other, thus maintaining the relationship unchanged. To take an example, an infertile or subfertile husband would not be justified in getting a doctor to inseminate his wife if she was in a drugged or unconscious state, especially if he knew that she had moral objections to the practice. The husband has no power and no liberty to act against his wife's conscience.

E The Right Not to Procreate by AI

If a couple accept that AI is morally problematic, how then does the language of rights apply? Most obviously, the couple would have a strict claim-right not to be pressurised into using the AI procedure. One can imagine this right holding against the state, if it was worried about underpopulation and was demanding that couples produce more children. Less difficult to imagine is the pressure put on couples by their own families and peer group to have children. Being childless can be a social stigma as well as a personal misfortune, hence the pressure imposed, consciously and unconsciously, to have children by any means. In the face of such pressure, each spouse has a right against the other to support in facing the temptation to water down their principles.

As was mentioned already, there is no right against the fertile to act as donors, if the whole practice is morally questionable. Likewise, doctors and medical personnel have a right not to be forced to provide an AI service if their conscience disapproves of it. In the case of the potential donor, a man may refuse to give sperm because he is opposed to the method of obtaining sperm - masturbation - or because he has no right (liberty or power) to waive his responsibility for the child he would be helping to procreate, or even because he has objections to AI as the beginning of a 'slippery slope' towards unacceptable further developments. The doctor may have similar objections at one remove, i.e. his expertise is involved in helping others to fail in their duties towards themselves and others.

Sometimes people talk about inalienable rights in these situations. For instance, if part of the marriage promises is the keeping of one's generative faculties exclusively for the expression of love for one's partner, the special moral right arising from this promise is of

such importance for some that it is inalienable - it cannot be waived or relinquished, just as one cannot waive one's right to sexual fidelity in marriage. It is suggested at times that AIH and AID are morally licit if both partners consent to these practices, but the stricter position on this within the Christian tradition denies the ethical competence to either spouse to release the other from the promise of generative fidelity. (One of the main reasons for this position is that the Roman Catholic tradition does not believe in the existence of a strict right to have children, but to the generative acts (i.e. sexual intercourse) which may lead to conception and birth of a child;cf. Reidy,1982:132; Marshall, 1964: 47.) Recalling that inalienable rights are not logically equivalent to absolute rights, since the former may in some cases be forfeited, it would appear that the doctrine on AI and generative fidelity of the Roman Catholic magisterium and others comes closer to the notion of an absolute right than an inalienable right. (Note that 'generative fidelity' is related more to AID than AIH; in the latter practice as well as in the former the strict view insists on 'generative integrity' also, i.e. procreation through sexual intercourse.)

8.5 The Christian Contribution to the Debate.

It may seem from the preceding discussion that there is little hope of discovering the Christian contribution to the debate on AI, since Christians seem to be pretty much divided on the issues. Recall how Hauerwas pointed out the confusion among Christians as to the reasons for having children, and add to this a similar confusion today concerning the means that may be legitimately used to found a family (Hauerwas,1981:157). True, there are strong differences of opinion, but one must not ignore the areas of agreement between and within the Christian

moral traditions. Also, the very differences within the Christian moral tradition can be instructive, revealing the struggle of the pilgrim community to discern God's will in this key area of human life.

A The Value of Honesty

Although the Roman Catholic opposition to AID is based on principles which oppose the separation of procreation from marital intercourse and the involvement of a third party in the intimacy of married life, one can presume that Catholic opposition will include the anxieties of Protestant Christians concerning the secrecy surrounding the AID procedure. All Christians must agree on the vital importance of honesty in family life. There is good sense in this statement from the Choices in Childlessness Report:

> Recent research into blood-groups has incidentally revealed the fact that a significant number of children born in wedlock cannot be the offspring of their accepted father. It might be argued from this that, if no obvious harm has befallen these children through this deception, no obvious harm need befall AID children if the facts are never disclosed. On the other hand, truthfulness may be said to possess a value of its own in human relationships apart from its more obvious utilitarian value. (Choices, 1982:44)

The Christian moral tradition must make a united stand against deception, whether this is done out of good motives or out of bad motives. (For opposition to such deceit,see Mitchell,1983:197; Winston,1987:171; Jones, 1987:176-177; Mahoney,1984a:291.) There is a paternalistic type of dishonesty which can be as bad as the type in which one misleads others for one's own gain. In AID it may be difficult to separate these two types. Secrets can be kept from children 'for their own good' as well as for the benefit of parents. Taking into account human propensity to sin, the Church of Christ must always warn

its members, and others, of the command not to do evil that good may come about (Rom.3:8).

B Rahner's Moral-Faith Instinct

It is noteworthy in the quotation just given, how the reasoning for the wrongness of deception is a mixture of principled and consequentialist types of argument. There follows from this, I think, a requirement that Christian ethicists take seriously the possibility that AI may be wrong in principle, even though the bad effects of the practice may not be obvious. If 'truthfulness may be said to possess a value of its own in human relationships apart from its more obvious utilitarian value' (Choices,1982:44), then perhaps the same can be said for the integrity of sexual intercourse in marriage, an act of such significance that some Christians have called it 'the marriage act'.

The key point here, I think, is the need to recognise that the harmful effects of some practices are spectacularly clear, while in the case of other practices such effects become clear only with careful discernment over time. In other words, some principled arguments may be based on intuitions as to the wrongness of certain activities or practices, long before the bad effects of those practices become apparent. I believe that this is the point being made by Karl Rahner (1972), when in the context of an essay on 'The Problem of Genetic Manipulation', he has this to say:

> ...to adopt a term from the contemporary theology of faith, there is also a moral instinct of faith, i.e. a universal knowledge of right and wrong belief. This 'instinctive' judgement cannot and need not, however, be adequately subject to analytic reflection. (Rahner, 1972:238)

In fact, according to Rahner, the expression of this moral faith-instinct requires the use of 'the categories

of rational analysis, 'reasons', conceptual arguments etc.', which conceal its character (ibid.). Here is a kind of moral 'knowledge' which does not depend on analysis of effects and justifying reasons, but in some way precedes them. Rahner recognises the possibilities of abuse in this notion of moral faith-instinct. He accepts the legitimacy of criticising this theory, while insisting that 'such criticism must neither dispute nor disregard the reality and rights of this universal instinct in reason and faith, irrespective of what it is to be called and how it is to be described and analysed from the point of view of formal epistemology (ibid.,239). If it is true that morality cannot be reduced to discursive rationality alone, then the Christian Church must be willing to take risks in supporting positions which are not established by the everyday wisdom. In relation to Artificial Insemination this might mean accepting the value of AIH and rejecting AID as a disvalue; or it might require a rejection of the whole practice as fundamentally misguided; or even the full acceptance of both AIH and AID, subject to certain conditions.

It seems that the Christian Church in general does express a fair degree of agreement on the rejection of further developments of AI, in the areas of eugenics, sperm-banks, and the commercial aspect of selling a promise of 'perfect' children. While one can imagine the bad effects of these developments, there does seem to be a kind of instinct which prevents one from considering these as legitimate. The attitude here is one which is willing to allow some intervention in the process of procreation for those who are desperate, but which wishes to draw some strict lines lest this process go too far.

So there appears to be a wide agreement in the Christian moral tradition which accepts that the ideal form of procreation is the type that involves simply the

sexual intimacy of the couple, and that any departure from this ideal must receive justification, and must be monitored to avoid abuse. The notion of a 'moral faith-instinct' is related to the grasp of basic goods and also to the idea of 'vocation'. It is because Christians tend to see procreation as firmly set within the context of the vocation of marriage that AID gives rise to moral doubts in the first place.

The moral faith instinct of Christians would, I presume, reject out of hand the idea that a childless couple might allow an anonymous donor to impregnate the woman by sexual intercourse; but this instinct is probably more developed and better backed up by actual experience than the instinct which reacts against AID. The very fact that some Christians have equated AID with adultery shows the confusion which this instinct against AID reflects. People have not had time to develop moral language to express the instinct, and so have borrowed judgements from the nearest related moral category. When that kind of judgement is seen not to apply, the temptation is to think that AID is justified, whereas in fact the basic instinct has not received a satisfactory expression and its value remains outside one's analytic grasp for the present.

C Vocation

In any discussion of vocation within a Christian context, I think it is important to take into account not just the aptitudes and inclinations required if people are judged to have a callng towards some state of life, but also the competence of the Church to lay down the conditions for the participation in the goods which form the basis of the way of life. These conditions include the means used to embrace a particular state. In relation to AI in general, part of the Christian Church has officially

stated that this is not a licit means towards parenthood and that the vocation to found a family must be satisfied in some other (licit) way. The Roman Catholic magisterium, in other words, codifies its basic moral faith-instinct in a normative form by rejecting the idea that couples have a vocation to parenthood if the only way this can be achieved is by means of AI. In particular, many Christians would deny a vocation to parenthood by means of AID, on the grounds that it violates the inalienable rights of the couple to exclusive use of each other's generative faculties. Other Christians, of course, do not share this instinct, and they hold that God may well be calling childless couples to parenthood by either AIH or AID. Disagreement on the licitness of the means leads to disagreement on the presence of a vocation.

In spite of this disagreement on the discernment of vocation to parenthood, there is some agreement between and within the churches on the danger of obsessive concentration on one's need for a child or children of one's own. It is essential to point out other options for people, which are also possible vocations; some of these may even involve caring for children procreated by others, as in teaching, nursing, or fostering/adoption. An obsessive concentration on one single option may only serve to blind one to other callings, and, worse still, it may lead to a moral blindness whereby couples will seek a child at any cost and by unscrupulous methods (cf.Ramsey's arguments concerning ends and means above,6.4,B.).

It should be recognised that there is a distinction between 'vocation' and the 'will of God'. Now, in effect this distinction is between two senses or applications of the single term 'will of God'. To have a 'vocation' is to be called to do God's will in a particular sphere of life. But it can happen that a person may reject a

calling and choose to enter some other state. For instance, consider a person who receives a call to be a single person but chooses instead to marry. Later, this person realises his/her mistake, but cannot simply opt out of the marriage that was entered into. In such a situation one may wish to say that it is God's will that a person adapt to a given situation, even though that situation is not the place he or she was called to. (This example is taken from Paul Quay,1974:1070.) In other words, life does not come to an end when something goes wrong with what one regards as one's vocational choice. One can still operate within God's will no matter how many vocational options are closed to one (cf. Clifford Stevens,1975:140-144, especially 141).

Thus, the Christian Church must insist on the point that, because vocational choice is fraught with all sorts of personal uncertainties, people should not put all their hopes on the attainment of some single option, as if their total happiness depended on achieving that end. In this way, the obsessional desire of some to have children seems almost pathological, rather than a sign of a strong calling. This implies, I think, that the notion of vocation cannot be used by Christians to support absolute right-claims to have children.

In conclusion, then, I would state that the Christian Church as a whole has a basic moral faith-instinct about marriage and parenthood as vocation. Part of this instinct concerns the limits which surround the vocation of parenthood in the Christian tradition, including the means used to achieve parenthood. The ideal means to this end is sexual intercourse, and whenever one moves away from this ideal there must be a justifying reason - the most obvious one being (in the case of AI) infertility. Where nature has 'broken down', as it were, and a couple cannot found a family through the marriage act, then human stewardship may be enabled (morally) to supply for

this deficiency. Where Christians disagree in this matter is on the extent of stewardship. Clearly, a couple should not attempt to achieve a good by attacking an equally important good, but Christians disagree on whether procreation in the 'natural' way (sexual intercourse) is such a good that it can never be bypassed; and they also disagree on the status of AID, on the question of the involvement of a third party, even though impersonal, in the procreative relationship. As in natural law theory in general, where the further one descends to particular norms in particular cases the more uncertain the conclusions become, so in relation to the means used to achieve parenthood one finds a good deal of moral pluralism and a conflict of moral instincts.

The Christian Church as a whole has a right to express its moral faith instinct on the vocation of parenthood. It has to steer a course between 'interpreting the signs of the times', listening to the world with its secular wisdom, and offering a prophetic stance which criticises secular wisdom as well as certain views within the Church. However, since moral faith instincts are often in need of development and are rarely, if ever, infallible, the Church must be especially respectful of individual dissent in this area.

8.6 Conclusion

The last three chapters have studied reproductive rights in situations that are relatively unusual, situations which depart from the norm. For instance, I considered the rights of poor couples especially in the Third World to decide on family size without state hindrance; the rights of the mentally retarded to have children or to be protected from this eventuality by society and the state; and just now the rights of the infertile to use a specific means to procreate. Though these cases are some-

what unusual, they are important in underlining the complex set of normative relationships possible when reproductive rights are under discussion.

In the case of Artificial Insemination the right to use this means to achieve pregnancy is controversial mainly because of the alleged violation of rights entailed by the process. The rights in question are themselves controversial, for instance the (mandatory) right to procreate only through 'natural' sexual intercourse, and the further right to exclusive use of the generative faculty of one's partner in marriage. Such rights are supposed to be the special moral rights arising from marriage and accorded to each other by the spouses entering that relationship. However, in a pluralistic society, and even in a Christian Church with differing views on marriage and procreation, it is difficult to get agreement on the exact conditions laid down in the contract or covenant for eventualities such as infertility. Certainly the majority of couples getting married do not consider in advance the exercise of their reproductive rights in relation to Artificial Insemination.

It is also problematic to show how rights are violated when AIH or AID are used as means to the end of founding a family. In the case of AIH in particular, the pressing need or desire to have a child tends to obscure the weight that might be given to the idea that this process is the first step on the road towards 'making or manufacturing babies'. And, indeed, it is arguable that when 'nature' breaks down in this way, human stewardship over creation permits this use of technical means in exceptional situations. There would appear to be a strong case for making the use of AIH a discretionary right. Because of the controversial nature of AIH one could hardly make its use the object of a mandatory right.

When one considers AID, however, there is greater difficulty in showing that reproductive rights are in conflict. Recalling that human procreation involves not just the good of passing on life, but also the good of sociability, the intimate relationship between the partners in marriage, the introduction of a third party (no matter how anonymous) into the relationship is a strong point in favour of the view that reproductive rights are being violated. The strict view on this, as held by many Christians, does not accept that the consent of the couple makes AID licit. The use of one's generative faculty is not a right one can waive; it is an inalienable right. (Remember the main fault of the Choice theory of rights: it does not take into account inalienable rights. On the other hand, the Benefit theory claims that it is never in one's interest to waive certain rights against others.) Again the point here comes back to the conditions laid down in the institution of marriage, which give rise to special moral rights. Whether AID is adultery in some sense is one of the main questions here.

(One of the major difficulties in seeing how the use of AIH and AID necessarily violates reproductive rights lies not just in the goodness of the end achieved, but in the consensual nature of the process. Put simply, when a couple really long for a child and consent to either AIH or AID, and when the bad effects of this decision are not easily discerned, it is hard to see how rights are violated. In this way, the cases studied in previous chapters are quite different. Regarding population control one was dealing with involuntary control of family size, limiting the number of children couples could have, often against their will. Regarding the sterilisation of the retarded, some of the handicapped can be treated as unruly children and incompetent when their condition is not all that serious. Possibilities of abuse seem greater in these cases than in AI.)

As well as considering the conflict of putative reproductive rights in this chapter, I also devoted a great deal of space to the various types of normative relationship that are possible depending on the particular circumstances. The technical Hohfeldian distinctions highlight the possible connections between rights and duties and the relationships between right-holders and duty-bearers. This brings out the second key point in any discussion of rights - given the importance of this good for a person what kind of claim against others is entailed? As one moves from AIH to AID, for instance, new characters appear on the scene in relation to whom the possibility of new rights and duties arise.

In relation to the alleged rights of the childless to use AI, various normative relationships are possible: between husband and wife; between the couple and the state; between the couple and the AI practitioner; between the couple and the donor; between the couple and the AID child. In each case the parties may have to face competing claims, for instance the state has to respond to other claims on its resources with regard to health needs. It is a particular substantive issue whether the infertile have a strict claim against the state to obtain help in founding a family, or whether they have a mere liberty-right permitting them to seek help from 'private' medicine.

It is also useful to use the language of powers and immunities when discussing the rights of the childless. Though all rights entail a normative relationship between persons, the language of powers and immunities concentrates attention on the ethical capacity of individuals to maintain or change their relationships. This is most important in the case of special moral rights, the kind most central in the area of reproductive rights. I would go so far to say that a power-right is the core right of the cluster of rights which make up

the category of reproductive rights. If one does not have a power to marry or to procreate, the further language of claims and liberties cannot be used. If a power does exist, then it is a another question whether this gives one claims or liberties against others.

The contribution of the Christian moral tradition to this discussion is indeed controversial. Christians, like those without any particular religious belief, disagree on the scope of the reproductive rights of the childless, mainly because God has not revealed what is to be done when this eventuality occurs. It is left to human reason, with the aid of general Christian values, to decide on particular strategies for enabling people to procreate.

Chapter 9

Reproductive Rights and In Vitro Fertilisation.

9.1 Introduction

The topic of this chapter follows logically from the discussion presented in the preceding chapter. Again I am dealing mainly with the plight of childless couples and the means used to achieve pregnancy and found a family. The central question, then, concerns the right to use IVF and ET as a means of overcoming infertility. However, I cannot ignore subsidiary questions concerning the alleged right to experiment on embryos created through IVF where the aim is the study of genetically inherited conditions, or the study of infertility, or the improvement of contraceptive techniques. Clearly, then, IVF is both in continuity with Artificial Insemination and also presents some new steps in the direction of 'making babies'(cf.Kass,1985). In continuity with AI, IVF (and ET) can include homologous and heterologous artificial fertilisation, i.e. it has some relation to artificial insemination by husband and by donor, depending on the circumstances. But where IVF differs from AI is in the matter of the location of fertilisation - outside the womb. For this it is necessary to remove an ovum (or ova) from a woman by laparoscopy and to mix ova and sperm in a petri dish (cf.Edwards,1986;Wood & Westmore,1984:ch 5). Hence the title '*in vitro* fertilisation' and the distinction between '*in vitro*' and '*in vivo*' fertilisation. In Artificial Insemination fertilisation takes place '*in vivo*', so it does not involve the same degree of scientific intervention in procreation.

All the moral issues arising from IVF follow on from what has been just stated. The fact that a woman's egg or eggs has to be removed from the womb and need not be

returned to the same individual is a revolutionary step in human reproduction; there is now a female equivalent to AID in the concept of ovum donation . Whereas up to this, a mother was always genetically related to the child of her womb, this no longer need occur. A woman who is unable to ovulate may still be able to receive an egg from another woman and have it implanted after fertilisation in her womb.(For further details about ovum donation,cf.D.Gareth Jones,1987:194-195.) And a woman who can ovulate, but has no womb to carry a resultant IVF embryo, can now seek to use another woman's womb simply to 'carry' the child up to birth. So there is a revolution in the concept of parenthood taking place, which goes beyond the simple distinction between genetic and social parenthood that AID introduced. The implications of this for individuals and for society can hardly be ignored in any discussion of rights to reproduce.

The second issue arising from IVF is of course the separation of procreation from the 'normal' means directed to that end - sexual intercourse. For some, the contraceptive revolution separated the procreative 'end' of marriage from the unitive 'end' by stressing the latter, and the 'reproductive revolution' (cf.Singer & Wells,1984) now separates procreation from sexual love by stressing the former. I mentioned this already in relation to AI, so I shall not repeat myself here.

The third issue which bothers many people about IVF and ET is the experimental nature of the process. I have been blithely talking about the IVF process in terms of taking eggs from women, mixing sperm, and then returning them to a woman's body as if it were as simple as baking a cake. Obviously the technology behind the IVF process is impressive, as one might expect when fertilisation takes place outside the body of the female. As well as being impressive, it is complex and developing. Robert

Winston (1987) describes some of the complexities of the process; for instance, the importance of removing an egg or eggs at the right time:

> At present, in vitro fertilization teams are able to work only with mature eggs and the egg is fully mature only about one hour before it is shed. The egg is collected at this time by sucking out the follicle, just before it would be released. If the egg is obtained much earlier it cannot be fertilized, so a great deal of effort goes into the exact timing of this stage. (Winston,1987:156)

Even with hormone testing and ultrasound being used to detect ovulation, sometimes the team misses ovulation in a particular cycle and must wait another month. Then when eggs are eventually collected, Winston describes the further process of identifying them and putting them into the right culture medium, incubating them at the right temperature before they can be fertilised with sperm. Great care is taken as well to wash the sperm in culture fluid and to dilute the material. The resultant embryo is allowed to grow up to a few cells and then must be examined to see if it looks normal enough to be transferred to the womb. And then comes the waiting, for the embryo to implant. And this does not touch on the complications of freezing eggs and embryos. What then are the moral implications of this technology?

In first place one can point out the emotional strain which the IVF procedure causes for the couple, especially for the female partner. Winston stresses this more than once and insists that couples know in advance what they will have to go through:

> Test-tube baby treatment requires a great deal of commitment from the couple and from the staff carrying it out. You may be asked to attend clinic at very unsociable hours and at repeated intervals. There is no doubt that you will be required to make some sacrifices to have the best chance of success. For example, it is very difficult to carry on

> working during a treatment cycle. (ibid.,153) The strain is always worse than the couple expect. The careful testing to time ovulation properly and the waiting time for egg collection and then embryo transfer requires fortitude. For the man, it may be difficult to masturbate and produce sperm when it is needed; the emotional tension at this moment is very considerable. (ibid.,161-162))

The second moral issue that arises concerns the moral status of the embryo which is produced outside the body. If it is regarded as a human person with full personal rights, then a question mark hangs over the whole IVF process. This question mark relates firstly to the development of the process which required experimentation on embryos, involving their destruction. If one regards embryos as persons, then it is widely accepted that experimentation which is not related to the welfare of the actual subject is morally wrong insofar as it treats the embryo as a means to the ends of others. Secondly, a moral question mark hangs over IVF in view of the effects of the process on embryos which are returned to the womb. If the process leads to an increased incidence of handicap which is diagnosed while still in the womb, is abortion in such cases justified? Should one allow oneself to get into such a moral dilemma from the very start by countenancing IVF? One can also ask at this stage whether IVF and ET leads to more than usual spontaneous abortions either before or after implantation?

Thirdly, what about the long-term effects of the IVF process on children born of it and who seem healthy enough at birth? Presumably the answer to this question requires a study of a large sample of IVF children right up to adulthood, something which has not been possible yet. And, of course there is the argument that such a study would itself be morally wrong because of the risks involved. In fourth place, IVF technology makes possible experimentation on the origins of human life and develop-

ment without having to consider the desires of childless people to have children. Here I am talking about embryos which are either created for experimentation or which are 'spare embryos' which are not needed for transfer to a womb. In other words, I have in mind the embryos which are not intended to develop their potentiality to birth and adulthood. What right do researchers have to 'create' embryos for this purpose? Finally, it can be argued that experimental processes like IVF and ET are expensive in terms of scarce medical resources and only serve to divert attention from more serious medical problems.

In terms of the language of rights, IVF presents particularly difficult questions of analysis. For instance, the matter of changing the institution of parenthood by introducing many novel kinds of relationship between children and their 'parents' seems to involve not just the rights of individuals but the rights of society as a whole, since parenthood and family life are widely regarded as key institutions in human life. One may say that AID brings about the first real change in the concept of parenthood, but IVF takes this many steps further, at least in principle.

When one turns to the vexed question of the alleged rights of embryos, one is confronted with the question of personhood and rights. Are embryos human persons, or does one have to qualify this to some degree, for instance, by giving the label 'potential person'. If such a qualification is accepted, then what rights, if any, can be claimed by such 'persons', and what happens when their rights come into conflict with those of 'actual' persons - those already born? Since childless couples intend to have their gametes fused and then returned to the body of the female, there arises from the start the question of the alleged rights of future persons, or perhaps one should say 'the future rights of persons who have not yet come into being even as potential persons. Do potential

parents not have to consider the possible effects of the IVF process on the children they insist on having by that means? So it may be interesting to study the possible conflicts between these various categories: actual persons, potential persons, and future persons.

9.2 IVF:'The Simple Case'

Much of the opposition to IVF is often based on expectations of the worst scenarios possible happening, the slide into a 'Brave New World' of manipulation. But it is only fair to give IVF a chance of being acceptable by surrounding it with safeguards. These limits to the development of IVF are the limits of the 'simple case' of IVF. This is how Singer and Wells (1984) describe the 'simple case'; it is

> ...the case of the married, infertile couple, where the egg is taken from the wife and the sperm from the husband, and the embryo or embryos created are all inserted into the womb of the wife. (Singer & Wells,1984:35).

So long as one stops at the simple case of IVF, then, one avoids the moral difficulties arising from the involvement of third parties in marriage which comes with heterologous artificial fertilisation. One avoids the problem of the treatment of spare embryos and experimentation on embryos with no intention of transferring them to the womb. And one also avoids the moral problems associated with surrogacy. But still one is not morally in the clear, according to some positions. In particular, the strict Roman Catholic position seems to be as much opposed to the simple case of IVF as it is to AIH (cf. Congregation for the Doctrine of the Faith, Instruction (1987:21).)

I have already presented the principled opposition to

artificial procreation on the part of the Roman Catholic magisterium, so here I shall simply mention again the view of Pius X11:

> Artificial fertilization goes beyond the limits of the right which the spouses have acquired through the marriage contract, namely, the right to fully exercise their natural sexual capacity within the natural performance of the marriage act. Their marriage contract does not confer on them the right to artificial fertilization, for such a right is in no way included in the right to the natural marriage act nor can it be deduced from it. (Pius X11, 19 May,1956; cf. Kelly,1987:108-109).

Note in this passage the references to 'natural sexual capacity' and 'natural performance of the marriage act'. And although the contrast is between the 'natural' means of procreation and the 'artificial' means of procreation, the essential point is that from the moral point of view one cannot separate the good of procreation from the unitive good of marriage, both of which are tied to sexual intercourse - the marriage act. Strictly speaking from this point of view, fertilisation outside the woman's body is wrong because it is a sign that sexual intercourse has not taken place.

It is noteworthy too how the quoted passage from Pius X11 uses the language of rights. There is a clear refutation of an unlimited right to produce by just any means. In fact, the means by which humans must reproduce is through the 'natural sexual acts of marriage'. Here again one encounters the claim on the part of the Roman Catholic Church to lay down the conditions for participation in the vocation of parenthood.

Objections to the simple case of IVF do go beyond the insistence on the inseparability of the two basic goods of marriage. People who accept the sundering of these goods in principle, for example with reference to contraception, can nevertheless oppose even the simple

case of IVF. At this stage I shall examine some of the further reasons for this opposition, starting with the question of the moral status of the embryo.

9.3 The 'Rights' of Embryos.

A Two Basic Approaches

Much of the discussion on the moral status of embryos rehearses arguments commonly put forward in the abortion debate. So what follows covers pretty familiar ground. Rather than go into a great deal of detail, I shall give a summary of the issues as presented by the Personal Origins Report. The Report deals with two main approaches to human origins. First, one is asked to consider the question of personal identity over time. Take, for example, the contrast between a new-born baby and the old lady eighty years later who has developed from that childhood state. How can one say that one is dealing with the same person? One answer to this question is as follows:

> We call the two the same, because behind every presentation of the individual human phenomenon we are accustomed to discern a subject, a 'someone' whom we call by a name, who is the bearer of a particular life-history...Starting from the conviction that human beings are subjects, must we not, the first school of thought asks, press back our perception of the continuous subject as far as we can see the objective grounds for doing so?... This approach, then traces the individual story back as far as fertilization, where the sheer contingency of the meeting of those gametes, one possible meeting out of millions, seems to constitute a wall of arbitrariness behind which the story of the individual cannot be taken any further. (Personal Origins,1985:28)

So this position stresses personal continuity from fertilisation on, even though the usual features of personal life - consciousness, rationality, memory - are

not present from the beginning. What matters is genetic continuity from the time of fertilisation. (This view is held by numerous writers, e.g. Iglesias,1984; Lejeune, 1985; Torrance,1984; Atkinson,1987; Foster,1985; Reidy, 1982.)

The second approach mentioned by the Report argues that the entity labelled an embryo, and later a fetus, must have certain attributes before it can merit the title 'person' and be given the rights of, say, a new-born child. This approach tends to pick out some 'particular threshold during pregnancy' when such attributes present themselves to one's moral judgment. Of course there are further variations within this overall approach, as different people concentrate on different stages of development. This is how the Report describes this general approach:

> To be a human is not merely to participate in one of a multitude of forms of biological life, but it is to be a subject of powers of mind and soul which set human kind apart from other forms of life. At the root of these powers is the phenomenon of consciousness, and it is as the subject of consciousness, the proponents of this view maintain, that we value the human being most fundamentally...Such a consciousness, at least in its human form, is causally dependent upon certain physical states, and in particular upon certain structures of the central nervous system and the brain stem. (ibid.,29-30).

In terms of the personal continuity of the conceptus and the old lady mentioned at the start of this section of the discussion, the proponents of this second approach tend to locate the beginning of the process of personal identity in the development of those parts of the body which lead directly to sentience and consciousness, that is, about forty days after conception. (cf. Lockwood, 1985:9-31; Singer & Wells,1984:94-98) Presumably one could talk about a right to life at this stage of development.

The Personal Origins Report attempts to be as fair as possible to the approaches treated above, but its authors insist that no final, scientific solution can be expected, which will settle once and for all the dispute about the moral status of the beginning of human life:

> Science, as such, can only report what happens; it cannot interpret it. It cannot tell us whether the genetic structures of individuality are more important to our understanding of what it is to be human than (say) the complexification of the nervous system, or vice versa. A decision between the approaches can only be made on theological or philosophical grounds. (op.cit.,30)

A similar belief in the philosophical and theological nature of the problem of personal origins is found in the Vatican's Declaration on Procured Abortion (1974). Although this document comes down in favour of the first approach discussed, it allows a degree of uncertainty in arriving at this conclusion,

> This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are as yet in disagreement. For some it dates from the first instant, for others it could not at least precede nidation. It is not within the competence of science to decide between these views, because the existence of an immortal soul is not a question in its field. (Declaration, in Flannery,1983:1-13;p.7),

The Declaration advises one to adopt a conservative or cautious approach in this matter, lest one takes 'the risk of killing a man, not only waiting for, but already in possession of his soul' (ibid.). In other words, one is required to act on the basis of a moral certainty that human life must be accorded basic rights, especially to life, from fertilisation on. (Moral certainty, rather than intellectual certainty of a type associated with mathematics or 'hard' science, is most important in making conscientious decisions; for a further distinction

between 'strict' and 'wide' types see, Peschke,1975:161).

B Delayed Animation.

When the Declaration refuses to state dogmatically the moment of animation or hominization, it recognises the earlier tradition of Christianity which held the concept of delayed animation. Bernard Haring (1974) explains the different opinions. On one hand, there is St. Albert the Great who held the position called 'instant or simultaneous animation', while St. Thomas Aquinas and his school held to the theory of 'successive animation'.

> The majority of theologians have followed the biologists and physicians who, over the last centuries, have become more and more convinced that the immortal principle of life was given at the time or at the very moment of fertilization. It is only of late that there no longer exists a consensus among biologists and physicians. (Haring,1974:76)

The basic notion here is similar to the second approach of the Personal Origins Report. Personal life is manifested in consciousness and self-reflection, so there must be some signs of an 'indispensable substratum' in the cerebral cortex of the conceptus if one is to recognise it as human. Some writers have applied this to the body-soul relationship; take Haring for instance:

> The soul is not pre-existent to the body; this is the common conviction. Does it then come into existence as a mere spiritual principle without a minimum of development of the bodily sub-stratum? The question concerns the beginning of a human person existing in the body and through the body, and prepared to express itself only in and with the body, at least in this earthly life. (Haring,1974:82)

The view in question seems to be that the personal soul cannot enter into the body until the body is prepared to receive it, and the development of the cereb-

ral cortex is the earliest stage when animation would be appropriate in the context of the approach which stresses personal characteristics of rationality and consciousness. Various problems arise concerning this notion of delayed animation, in particular the specification of the concept of soul and the underlying dualism implied by the notion of delayed animation - instead of the soul pre-existing the body, now the body in some sense pre-exists the soul (cf.Singer & Wells,1984:92-94). Moreover, if a soul is seen in terms of a principle of life, then it is ultimately mysterious how the embryo develops to the stage when it can receive an infused rational soul; it seems as if one is pushed back into a theory of successive animation, where the embryo begins life with a different kind of soul from the personal-human one it will receive at a later stage of development. All of this is quite mystifying, and it seems questionable if the whole discussion of 'ensoulment' is very helpful either here or in the debate on abortion.

(From the 'pastoral' point of view Christian theology seems to find the doctrine of the soul useful in reference to discussion of life after death. Since some personal survival is demanded in Christian doctrine in spite of the body's disintegration after death, the idea of a spiritual soul presents an image of a sort that is helpful in dealing with the questions raised by believers, as long as one does not probe too deeply into the image. However, it is easier to think of an immortal soul continuing in existence after death than to think of such an entity coming into being at the beginning of life in relation to a human body. This seems to be an example of an image helpful at one level but decidedly unhelpful at another.)

Related to this view that questions whether personal life is present from the 'first moment of conception', is

the position held by some theologians which puts great emphasis on the concept of individuation. Take, for instance, the following position expressed by the Roman Catholic theologian Kevin Kelly (1987):

> As a Roman Catholic I feel it is important, therefore, to take note of any scientific facts which would seem to constitute 'contrary evidence' to the position that fertilization is the key moment, after which the embryo must be accorded full human respect. Two pieces of contrary evidence are frequently mentioned.
>
> The first is the possibility of twinning and even of consequent recombination during the first few weeks. It seems that the possibility of twinning actually occurring is statistically very small. However, it also appears to be the case that it would be at least theoretically possible by human intervention to make it happen in every fertilized ovum. This puts a large question-mark against the claim that we are dealing with a human individual at this early stage, since the stage of definitive individuation has not yet been reached. Without definitive individuality it seems impossible philosophically to speak of a human being in the proper sense of the word. (Kelly,1987:125-126)

Note that individuation or individuality here is not a matter of personal self-consciousness - not even the new-born child has this characteristic - it is instead a purely 'physical' differentiation of one entity from another, even of one identical twin from another. This seems to be more basic than self-conscious individuality and a necessary step in that direction. Now if in the earliest stages of human development one cannot identify a separate individual, it makes it extremely difficult to accord the embryo full human rights. (For theologians holding such a view, see, Mahoney,1984:Ch.3; Curran, 1982 :125-126; Lobo,1985:267)

The second point of 'contrary evidence' to the established Roman Catholic view, according to Kelly, is the well known matter of fetal wastage (ibid.,126-127).

Kelly is not too interested in the rate of such wastage; but he uses this phenomenon to underline the way in which there appears to be a double standard regarding respect for human life at this early stage and later on when the fetus is developing. For instance, if spontaneous abortion of early embryos is likened to a natural disaster, why the fatalistic attitude to it, and indeed, why is fetal wastage not regarded as equally 'tragic'? Has psychology so far triumphed over ontology in the established view? Granted that no personal relationship has developed between the mother and the early embryo in many cases, surely the very existence of a human person in the womb requires that one does something to save it from extinction? But, says Kelly, 'I do not get the impression that even the most committed 'anti-abortion' doctors would adopt that approach to foetal wastage [that it is a natural disaster which one should try to overcome]. They and their medical colleagues do not consider the prevention of foetal wastage to be a high medical priority.' (ibid.,127;cf. Bok,1981:52 for the logical conclusions of respecting life from conception.). If no priority is given to saving the lives of human persons from the first moment of their existence from the ravages of nature, then what does this say about the 'rights' of these 'persons'? Either they have no strict right to life, or their right to life is being violated by the omission to initiate medical research into preventing fetal wastage.

C Embryos as 'Potential Persons'

If personal identity is to be located sometime after fertilisation - after individuation or after the beginning of the development of the cerebral cortex - how should one speak of the conceptus before these decisive events? One response to this question is to speak of embryos as 'potential persons'. Thus, three members of the Warnock Committee expressed dissent on the use of

human embryos in research saying that,

> The special status of the human embryo and the protection to be afforded it by law do not in our view depend upon the decision as to when it becomes a person. Clearly, once that status has been accorded all moral principles and legal enactments which relate to persons will apply. But before that point has been reached the embryo has a special status because of its potential for development to a stage at which everyone would accord it the status of a human person. It is in our view wrong to create something with the potential for becoming a person and then deliberately to destroy it. (Carriline, Marshall, Walker, in Warnock,1985:90)

The key point here is that the embryo is not said to have actual personal status but a 'special status' connected with its potential to become a full human person. This position logically implies that the whole process leading to the development of IVF was morally flawed, since embryos had to be created for experimentation and for destruction. In other words, some potential persons were sacrificed so that others might be created for a relatively safe transfer to the womb. The dissenting members state clearly, 'We would therefore support the creation of embryos with a view to their ultimate implantation in the uterus' (ibid.,91).

There are of course great difficulties in using the concept of a 'potential person'. In part, the dissenting members above recognise some of these. For instance, they agree that ova and sperm are also potentially persons, but their potentiality is different from that of the embryo, since on their own, without any human intervention they cannot develop into human persons. It seems that the act of fertilising the ovum makes a key difference to the potentiality involved.

The American philosopher Joel Feinberg provides a helpful discussion of the 'Paradoxes of Potentiality' (Feinberg,1974:183-184). He draws a distinction between

'direct or proximate potentialities' and those which are 'indirect or remote'. Thus, one criterion for proximate potentiality is causal importance. One could say that orange powder is potentially a brick: all one has to do is to add water and cement. But orange powder is not causally important in this process, certainly not as important as the cement and the water. On the other hand, orange powder is causally important if one is intending to make an orange drink. In the case of the origin of human life, it is arguable that both sperm and ova are equally important causally, and that some act of fusing the two is also essential within the causal nexus.

Just to say that the fusion of the gametes is causally important, even essential, is not, however, to arrive at the necessary conclusion that the embryo now has personal status equal to a new-born child. Here one has to fall back on the two main approaches to personal origins: one which stresses genetic continuity and the other which stresses the later stages of personal development. If one holds the first view, then the later development of the embryo into a fetus, also recognised as causally important, is simply tagged on to the genetic criterion which is regarded as primary. But if one holds the second approach, then the genetic criterion, while recognised as causally important, is not thought to be as important causally as the later stages of development, when the embryo-fetus begins to show 'real signs' of being a human person. True enough, if one wishes to create a child, one must begin with the fertilisation of gametes, but for those who hold the second approach the kind of potentiality possessed by the early embryo is not morally compelling in all instances, and especially when the needs of developed persons are in question. So the notion of potential will be interpreted differently according to the view one has of the nature and beginning of personhood. (For further discussion of potentiality,cf. Johnstone,1982 & Warren,1977.)

The usefulness of the concept of potentiality has been questioned by John Mahoney (1984b) in his Bioethics and Belief for basically the same reasons as were given above, and in particular because the term 'potential' can be applied equally to the child at birth and to persons at a later stage of personal development (cf. Mahoney,1984b:55). In the modern personalistic-existentialist way of looking at human life there is a tendency to say that persons are always in the process of becoming. Thus, potentiality does not distinguish sufficiently between human life before birth and after birth.

Against this, however, it does seem possible to make helpful distinctions between more basic and less basic types of potentiality. It seems obvious to me that there is quite a difference between the potentiality of an adult to become 'more human' in a moral sense and the potentiality of an embryo to become a self-conscious individual of the human species. Not only is the second type of potentiality chronologically primary, it is different from the first type of potentiality in not depending on the embryo's freedom (since it has none). In other words, human potential to mature into adult persons from a less mature (moral and psychological) state depends to a great extent on a person's own free decisions, whereas the development of the embryo depends more often on circumstances beyond the embryo's control. So it seems that one may be able after all to distinguish between potentiality before and after birth, and especially between the potentiality of the embryo and that of the adult to become more mature.

The other problem with the notion of potentiality, of course, is that it immediately puts the 'potential person' into a weaker position vis-a-vis the 'actual person' when interests conflict. One reason for this is that the self-conscious person has interests in the sense

of desires, wants, needs, whereas the potential person (in this case the embryo) at its earliest stages cannot have desires or wants or conscious needs; one can only say that it may be in its interest to live, in view of one's belief that life is good. Perhaps this is one of the reasons why the Archbishops of Great Britain have stated that 'Each new life is the life not of a potential human being but of a human being with potential' (cf. Flannery,1983:29). But of course this statement simply assumes that a human being is present from the moment of conception and is not essentially different from an adult human being.

In fact, one can still say that an embryo is a potential person while insisting that what is in its interests cannot automatically be subordinated to the conscious interests of adults. After all, there are cases where the conscious interests of adults should not necessarily be respected, e.g. those of the chronically depressed and suicidal. Here one may be justified in taking a paternalistic approach by stressing what is in the person's interest, even though the person may not be interested in what is in his interest (cf. White,1985:79ff.). What I am criticising here is the view that rights are directly related to conscious interests alone. The Benefit or Interest theory of rights must take into account what is actually good for a person, what is in the person's interest, while not forgetting freedom of conscience and the right to do wrong.

D Risking the Life of the Embryo

From the discussion so far it must be clear that human beings are unlikely to agree on the question of when personhood begins, and, as a result, there will always be some disagreement as to when rights are to be first accorded to embryos and fetuses. With reference to the simple case of IVF, then, one can expect some people to

reject this procedure out of hand just because it involves experimentation on embryos, the creation of embryos with no intention to transfer them to a womb. On the other hand, one can expect others to accept the simple case of IVF on the grounds that embryos are potential persons who may be sacrificed for serious reasons. This view gains strength. as was seen, from the evidence that individuation occurs about two weeks after fertilisation, and the evidence that so many embryos never develop their potential within the womb.

According to Richard McCormick (1981:330), the experimental process leading to success in IVF can be seen, not as replicating nature's disasters, so much as replicating its achievements, while tolerating some disvalues. One does not criticise couples who by their sexual intercourse create embryos which spontaneously abort in the course of nature, so why should one criticise those who form embryos by IVF and who allow embryos which are not developing properly to die? Just as it is arguable that nature weeds out some of the more potentially handicapped individuals before they see the light of day, so it is arguable that man as a part of nature can decide it would not be in the interest of some embryos to be implanted, especially if they have been damaged in the process of IVF. Or humankind may think itself justified in allowing the greater risk of spontaneous abortion after IVF, because of the continuity between this and nature's own prodigality, as revealed in the various figures given of fetal wastage.

There is, I think, some danger in personifying nature as McCormick appears to do. 'Nature' does not act consciously as man does. Nature cannot be self-centred or vindictive as humans can be and often are. There is a difference even between scientists returning an embryo to the womb and then letting 'nature' take its course, leading to birth or spontaneous abortion, and these same

scientists deciding that some embryos are not worth placing in the womb. Both situations are problematic from the moral point of view, if only because it is doubtful whether humanity 'replicates nature's achievements' all that well. It seems to be the case, for instance, that rates of spontaneous abortions are higher after IVF than after 'natural' conception (cf. Edwards,1986:50).

In the case of deciding which embryos to place in the womb, the doctors seem to judge by the rate of growth of the embryo (or what McLaren,1986:5 calls the 'pre-embryo) up to two days after fertilisation. If the embryo appears deformed, it is not put back into the patient. But Winston recognises that mistakes are made here: 'All workers in IVF can recall instances when apparently diseased embryos were not replaced, but when they were subsequently left in culture they developed into perfectly normal blastocysts' (Winston,1987:71). On the other hand, what seem to be normally dividing embryos abort after implantation. If 'nature' is replaced by God in this discussion, then it is open to one to say that God's will that an embryo be allowed to develop has been twarted in such cases. Because of the fear of deformity, man's nerve fails him in these situations, but God or nature never fail in this way - the embryo aborts, or is born deformed, or is born healthy. The criticism in these situations to the effect that man is 'playing God' is based on the fact that human kind does not know what God's will is in these situations. Thus there is some doubt as to whether humanity is replicating 'nature'.

Kevin Kelly seems to be thinking along the same lines as McCormick when he asks the question, 'Could causing the death of an embryo ever be an expression of reverence for life? (Kelly,1987:122). His answer is affirmative and is based on the traditional approach in Roman Catholic moral theology to conflict of life in birth-room situations. Sometimes the life of an embryo or fetus can

be taken indirectly in order to save the life of the mother. For instance, if one is in a situation where both mother and child will die unless the life of one is taken, then life must be taken. 'Reverence for life, therefore, is the dominant meaning of this action which includes within it abortion as one of its constituent elements' (Kelly,1987:124). Kelly thinks that only after weighing the conflicting goods and taking into account the special circumstances, can one give the act its proper moral evaluation and description - either abortion or saving life. Taking the life of an embryo or fetus is then in full accord with the position of full respect for these entities, according to this author.

However, to say, as Kelly does, that indirect abortion may be consonant with respect for life does not lead one to the conclusion that IVF is justified. This is because the values which have to be weighed in IVF are different from those conflicts between lives involved in birth-room situations. In IVF one has to weigh the lives of embryos against the desires of couples to found a family, and it is not clear from Kelly's discussion above that potential life can be sacrificed for this reason, unless of course one already holds the position that embryos are not full persons. (One should also recognise that the traditional application of the doctrine of double effect does not simply allow one to abort the fetus when the mother's life is in danger. For instance, craniotomy was regarded as illicit, since it involves the intention to kill the child as a means of saving the mother, and this is direct killing according to the doctrine of double effect; cf.Boyle,1977. Nor is there any important difference morally between 'letting die' and 'killing' if embryos are not replaced in the body and if they have some right to develop their potentiality.)

Paul Ramsey (1984) is quite insistent that abortion in the context of IVF is a different matter from the usual

context where pregnancy is terminated.

> Suppose we agree that the mother's life and health broadly interpreted, that the family's economic and other welfare, that the welfare of children already born may be deprived by another child born into the family, and that these are countervailing considerations that are overriding and that justify therapeutic abortion - in the broadest possible meaning of "therapeutic" - all that in no degree justifies creating a new human life at risks that foreseeably may require subsequent abortion. (Ramsey,1984:36).

Ramsey accepts as justified many cases of abortion because they involve 'the concept of "necessity" in conflict-of-life situations' (ibid.). But 'to continue on the way of the new genesis of human lives involves no such "necessity" - not in the genesis itself' (ibid.).

E The Ethics of Risk.

Even in the simple case of IVF which I have been discussing so far, opponents of the procedure can point out two kinds of risk which follow from its experimental character. One is to do with the rate of spontaneous abortion, which may be increased in the IVF process; the other with the possible increase of deformity in children born of the process. In the first case one might choose to speak of potential persons having their potentiality short-circuited by man's technological intervention (though it must not be forgotten that even this potential would be impossible if IVF were not available to infertile couples.). In the second case, one might consider referring to future persons and their interests, given that some childless couples are intent on having a child whatever the risk to the child's future health which arises from the process. It is the second case which interests Ramsey most, and it has the advantage of side-stepping the issue of the moral status of the early embryo - one may disagree on whether or not the embryo is

a person from fertilisation on, but no one can afford to ignore the health and welfare of children brought to birth by IVF.

Ramsey takes a high moral view of the risk involved in manipulating procreation by IVF. He insists that 'A human experiment must be moral in its inception, not in its outcome' (Ramsey,1984:33). The experimentation demanded by IVF could not be moral in its inception, according to Ramsey, because there is a gap between 'animal work' and human trials, and because one cannot be sure of the long-term effects on IVF children until about two to three thousand children are born and develop to adulthood. But this means treating such individuals as guinea-pigs, as means to the end of satisfying the desires of childless people. Ramsey thinks that his argument applies to freezing semen, or ova, or embryos, of the human species. And he concludes: 'No one needs to know that the figure is 50 or 3000 or 30,000 successful test babies, to sustain the argument I put forward.' (ibid.,34).

Ramsey's view on avoiding risk is not universally accepted. Marc Lappe, for instance, writing in 1972 before the arrival of the first test-tube baby, comments on public opinion with regard to risk-taking for the unborn:

> The current weight of public opinion and common standards of medical practice regarding the restoration of fertility to childless couples greatly reduces the cogency of any argument which would protect the in vitro embryo from any and all potential risks of damage. Fertility drugs which induce super-ovulation are used without regard to the likelihood of multiple births and resulting stunting of fetal growth, prematurity, and higher risk of respiratory disease and death. Artificial insemination with husband or donor semen is practiced on an ever more regular basis without knowledge of the possible increased incidence of mutations as the result of sperm storage or other uncertainties entailed in the insemination procedure. (Lappe,1972:2).

This, of course, is the weakest moral argument for allowing risk, namely, that public opinion favours it; but fortunately it is not the only argument mentioned by Lappe. He is of the opinion that one can assess the risks of IVF and arrive at an 'acceptable' level: 'In the case of human babies produced by in vitro procedures, prsumably this level would be one which was equivalent to the risks normally undertaken in a "natural" pregnancy' (Lappe,1972:2; cf. Kass,1981:454-45 & Iglesias,1985:93-94 for a more sceptical assessment of the advance of medical science in this area). But this does not solve the problem of arriving at the stage where one actually finds that the risks of IVF are acceptable, since to do that leaves one open to the charge of being willing to sacrifice certain individuals on the basis of the possibility that the risks may be unacceptable. In other words, one is faced with Ramsey's principle that an experiment on humans must be moral in its inception not simply in its outcome.

From the beginning of the application of IVF to humans, then, there must be some assurance that the risk will be minimal. Hence Lappe declares that 'Recent evidence of the resiliency of the early mammalian embryo certainly indicates that fears of gross monstrosities are probably unfounded.' (op.cit.,2). When it comes to loss of embryos after implantation, Lappe refers to the significant proportion of natural wastage, and suggests that this is nature's way of disposing of abnormal embryos, a kind of natural selection. As he puts it,

> Although the exact proportion is incompletely known, as many as 80% of all chromosomally abnormal embryos may be lost during the first and second trimester of pregnancy. Thus, there is reason to believe that potentially abnormal human embryos developed in vitro would be subject to a winnowing process which would help reduce (but not necessarily eliminate) abnormal embryos. (ibid.,3)

It can be seen that Lappe does not deny the possibility of some risk to potential and future persons as a result of pursuing an experimental procedure like IVF, but he does seem to make a strong case for minimising risk to what might be regarded as an acceptable level. Note that the degree of risk is a scientific question, whereas the acceptability of this risk once discovered is a question of values or of moral theory.

One final point needs to be made here, and that concerns the risks allowed already in procreation. I refer here not just to the inherent risk of handicap when any couple conceive a child, but also to the freedom allowed to couples most clearly at risk in this area. On this point Lappe states that 'Even in the most extreme cases, for example among women with phenylketonuria, whose offspring are virtually certain of receiving some damage during gestation, no one has enjoined them for procreating except by moral suasion' (ibid.). Again one is faced with the concept of the right to do wrong; there is no obligation to prevent all wrong actions happening by every means at one's disposal. But is moral suasion enough to protect future persons and potential persons from the possible effects of IVF? If one regards embryos as having some rights, especially rights to life and not to be used as guinea pigs, should one not look for legal protection for their rights? Yet again, it seems to me, the answer to these questions depends on the view taken of the moral status of embryos and the weight given to the needs of childless couples.

9.4 Beyond the Simple Case

A The Revolution in Parent-Child Relationships

The closest analogy I could find to the simple case of IVF was AIH. Gametes from husband and wife are fertil-

fertilised in vitro and returned to the wife's womb. No spare embryos are left over. All seems neat and well-ordered. But then I had to take into account the road taken to achieve this orderliness and the future risks undertaken from the start. Now I must take another step, recognising developments beyond the simple case which will raise further hackles for many opponents of the procedure.

If the simple case of IVF is something like AIH, one has to consider other kinds of IVF where the procedure is like AID. If a woman has blocked fallopian tubes but is able to ovulate, and if her husband is subfertile or azoospermic, then her ova may be removed in the usual way and mixed with donor sperm before being placed in the womb. This is the straightforward case of IVF combined with AID. To the moral problems of AID discussed already I add the moral problems related to the experimental character of IVF. If the woman is infertile in the sense of not being able to ovulate, and if her husband is azoospermic, then the IVF process can involve donor ova as well as donor sperm. This has presented great difficulties for scientists, especially in the attempt to synchronise the cycles of the the two women.

Such developments mean that a revolution has taken place in the relationship between women and their offspring. This is highlighted by the arrival on the scene of the concept of 'surrogate mother' which implies that the 'genetic' mother of a child need no longer be the 'carrying' mother, and neither need be the 'social mother'. If rights are to do with important interests of human beings, then such changes in the relationships making up family life must be carefully considered in view of the possible damage to future generations who will have these changes foisted upon them.

I think I have said enough about the risks of ex-

perimentation relating to possible handicap in the last section of this chapter, so let me explore further the experimentation involved with the form of the family as a result of gamete donation and surrogacy.

R. Snowden, G.D.Mitchell, and E.M.Snowden (1983b) provide 'A Suggested Nomenclature' for the new relationships between parents and their offspring as a result of going beyond the simple case of IVF. One can talk of the 'Genetic mother', which is the role played by the woman who produces and matures the ovum. Then one can refer to the 'Carrying mother', which centres on the role of the woman in whose uterus the embryo implants and develops into the growing fetus. Then one has the 'Nurturing mother' - the woman who will care for the baby once it is born. The 'Complete mother' is the suggested name for the woman who undertakes all three roles above. On the other hand, one gives the label 'Genetic-Carrying mother' to the woman who provides the ovum and the womb, but does not nurture the child once born. The 'Genetic-Nurturing mother' supplies the ovum to a surrogate and then receives the child for nurturing. The 'Carrying-Nurturing mother' receives an ovum from a donor, carries the child in her womb and nurtures it after birth. This is the closest one can get to a female version of AID. On the father's side relationships are less complex. There is the 'Genetic father' who provides the sperm or male gametes. Then there is the 'Nurturing father', usually the infertile husband in AID. And, finally, there is the 'Complete father', which is the normal case of fatherhood - the man is both genetically related to the child and cares for it after birth along with the mother (cf. Snowden, Mitchell, & Snowden,1983:32-35).

Now, in my discussion of AID I briefly touched on the distinction between 'Genetic' and 'Nurturing' fathers. I noted the traditional Christian objection to the separation of the two, an opposition which is too some

extent breaking down, especially within some Protestant denominations. The objection on principle was to the interference of a third party in the intimacy of marriage and procreation and the dubious right of the donor to give up responsibility for his seed to the 'Nurturing father'. From a more consequentialist perspective, objections centred on the right of AID children to know at least the genetic identity of their donor fathers and the right not to be lied to regarding their origins. (Some have also pointed out the dangers of accidental incest resulting from multiple donations of sperm, but this risk can be greatly reduced by limiting the number of donations from any one man; Warnock suggests a limit of ten children per donor,1985:27.)

It seems to me that ovum donation replicates some of these problems associated with AID. Now it is the woman who can act as a donor of sex cells, remaining anonymous and giving up responsibility for the care of the child that will be produced. (Anonymity of ova donors is problematic because of the need to synchronise fertility cycles.) Again there are problems with the right of any woman to relieve herself of such a responsibility, no matter how good the intentions. There is not the same problem relating to masturbation when one is speaking of ovum donation, but, on the other hand, removal of ova involves a more invasive technique than masturbation, with greater personal risk to the woman.

One can also imagine some legal difficulties regarding the legitimacy of children born as a result of ovum donation. If there are problems from the point of view of 'Nurturing fathers' falsifying birth registers to wipe out all trace of the 'Genetic father', can one not expect parallel attempts to wipe out all trace of the ovum donor? Indeed, there may be a greater temptation to do this, since the recipient of the egg (duly fertilised by her husband, let us suppose) then carries the developing

embryo in her womb to birth, and that experience of pregnancy may lead to a refusal to recognise the origin of the child. This 'forgetfulness' about personal origins can lead to deception in the family and deprivation of the right of the child to know its genetic origins.

In ovum donation the 'Carrying mother' may feel something like the infertile husband in the context of AID - at least the child will be genetically related to one of the spouses. However, the woman has the advantage over the infertile husband, since she has the experience of carrying the child to birth. She can feel that she is contributing a great deal to the process of founding a family. It is a different matter, of course, when one considers embryo donation, where the embryo is not genetically related to either of the recipient spouses.

Cases of this type have been called by some, for example Carl Wood's team, 'pre-natal adoption' (cf. Singer & Wells,1984:79). This title is given because in adoption neither adopting parent is related genetically to the child, and because in ordinary cases of adoption the earlier a child can be adopted after birth the better. Singer and Wells cite Roger Short as saying, 'You don't adopt a 10 year old child, you try and adopt a newborn baby. Even better than adopting a newborn baby is to adopt a fertilized egg' (Singer & Wells, ibid.). A further advantage of this is that the donor couple (supposing the donation to come from a husband and wife) find it easier to give up an embryo than a child the wife has carried to term. And, of course, the recipient couple can have the experience of pregnancy as an added bonus.

Some have not been so happy with the justification of embryo donation in terms of adoption, pre-natal or otherwise. Most trenchant in his critique of this concept is Oliver O'Donovan (1984) in his work Begotten or Made ?

There he attacks in first place the notion that Artificial Insemination is a kind of adoption in which the couple adopt the sperm of the donor. (A similar point could be made with regard to ovum donation.). In adoption, he says, the adoptive parents simply represent the genetic parents who cannot or will not take responsibility for the child. But no such thing happens in relation to the donation of gametes, since the act of AI is the act of the couple, not of the donor - he has not procreated. Adoption always has meant the taking over of responsibility for the child that others have procreated (O'Donovan,1984:36).

But what of the case mentioned above of embryo donation where the embryo is the result of the fusion of gametes of a married couple who could be said to have 'procreated'? This case is likewise rejected by O'Donovan. For one thing, it seems as though one is now trafficking in children. Whatever one might say about the notion that gametes are the property of human parents, O'Donovan refuses to accept that embryos are such property: 'The notion that one might undertake to become the parent of a child in order to alienate one's parental relation to another, implicitly converts the child from a person to a commodity' (ibid.,37). Whether one 'gives the child away' earlier or later is not of interest to this author; because people find it psychologically easier to give an embryo rather than a newborn baby does not change the judgement that each is morally wrong, given the argument O'Donovan presents.

Besides seeing the donation of embryos as a kind of trafficking in children, O'Donovan points out that such donation is unlike adoption because adoption is always essentially an act of charity towards the genetic parents on the part of the adoptive parents (though the uppermost idea in the minds of the adoptive parents may still be the longing for a child). But embryo donation and sur-

rogacy change this relationship around. If one prescinds from the commercial motivation of certain cases, many are more sympathetic towards the kind of case where the motivation is one of compassion and charity towards the childless. Cases where sisters act as surrogates for siblings are often highlighted as altruistic examples. The main difference between such cases and adoption is that a child is deliberately procreated with the intention of giving it over to an infertile couple, and this is very different from the normal case of adoption.

I have underlined the arguments for and against the view that the new forms of procreating children with the help of donors are really different forms of adoption. I presume that efforts made to show that the new reproductive technology is capable of being fitted into some of the older categories of family life, albeit the secondary institution of adoption, are partly an attempt to forestall the objection that the new techniques involve a radical experiment in the social sphere, especially in the institution of the family. The arguments of writers like O'Donovan, which try to show that such rationalisations fail, bring out clearly the experimental nature of these novel developments and the unease to which they give rise in the human heart.

Discussion of the nature and value of family life in society is a topic I cannot discuss in detail in this thesis. Clearly, many people today still regard the family as a basic institution, and the Christian tradition certainly upholds this evaluation. Others have a more ambivalent attitude to the family. (Think, for instance, of F.Mount,1982:1 for reference to the family as a 'subversive organisation'; or D.Cooper,1972, for a psychoanalytic critique of the nuclear family, echoed by J. Mitchell,1986:ch 9.)

So, there are various attitudes to the family as in-

stitution. Within the context of this thesis I am assuming that the family is a good thing, a place where both adults and children ideally find security and mutual acceptance. It is where one finds one's personal roots, and this is why one must be concerned with the implications of IVF and surrogacy for the question of personal origins. Yes, the family in history has undergone certain changes and seems to be pretty resilient, but one must not ignore the revolutionary changes coming about as a result of this new technology, which goes right to the heart of basic human relationships. Although much of public opinion, as well as scholarly opinion, appears to place stress on the nurturing relationship of parents to children rather than on the genetic relationship, there is scant knowledge about the effects which a radical tampering with the genetic basis of the family will have on future generations, especially on the psychological level. Thus, one of the main objections against IVF beyond the simple case, is that it involves a double degree of experimentation - on the biological/physical level, and on the social/ psycho-logical level.

Interestingly, the most dramatic of the new reproductive techniques - IVF with surrogate motherhood - has presented most difficulties, and this is not simply due to the fact that the embryo in the womb of the 'Carrying mother' need not be genetically related to her. What strikes most people as problematic is the fact that a woman can carry a child for nine months with the intention of giving it up. In fact, a woman can intentionally get herself into this position, for the sake of someone else. The problem is that people generally expect a woman to develop a strong relationship with her baby during the course of her pregnancy, and there is a tendency to clearly distinguish this situation from the donation of gametes, whether ova or sperm, or an embryo for that matter. There is a widespread intuition, found

equally in the controversy about abortion, which is uncomfortable with breaking the intimate relationship between a woman and the fruit of her womb. So attitudes towards surrogate mothers are often mixed. On one hand, many find it difficult to accept commercial surrogacy arrangements (and the Warnock Report echoed this disapproval), while on the other hand, many would consider more altruistic examples as bordering on the heroic. In all cases, one tends to judge the surrogate negatively if she does not show signs of a strong connection with the child of her womb.

In subtle, and not so subtle, ways, then, society shows a certain disapproval of surrogacy. Regarding commercial surrogacy, the woman is often criticised for being involved in a kind of prostitution, where the term is widened to include the introduction of economic values to an intimate part of life where those values are out of place (cf.Rassaby,1982:103; Ince,1984:99). The sacred and the profane still do not mix, and in a developingly non-religious world, perhaps the sphere of conception and birth are among the few remaining 'sacred' areas where the 'profane' world of mammon must stay outside.

Regarding altruistic surrogacy, the surrogate is seen in a more favourable light, even in an heroic light. But there can be a back-handed type of criticism of this type of surrogacy, insofar as the pain of giving up a child is still stressed, which leaves open the query 'What kind of woman can bear such a pain?' A question-mark hangs over the alleged 'heroism' of the surrogate mother. In terms of rights, this means that society makes it difficult for surrogacy to be claimed, since there is such a wide disapproval of some of its basic aspects. In general, the various legal wrangles that have developed in the U.S. over surrogacy arrangements appears to support much of the negative public opinion against commercial surrogacy at least (cf. Ramsey,1984:27-30). It is doubtful whether

anyone benefits from such acrimonious, public disputes.

B 'Slippery Slope' Arguments

Discussions of medical ethics seem most prone to the onslaught of 'Slippery Slope' arguments. Even the title of certain books suggest the argument, as in Richard McCormick's How Brave A New World ? and David Rorvik's Brave New Baby (Rorvik,1978). The argument has other names as well, as Samuel Gorovitz (1985) reminds his readers: 'the primrose path argument, the thin end of the wedge argument, and the camel's nose in the tent argument. Its structure is familiar: once one starts sliding down a slippery slope, things get out of control. There is no stopping; disaster awaits us.' (Gorovitz, 1985:167).

Paul Ramsey (1984) seems to rely heavily on such an argument in his opposition to IVF:

> After all, Great Britain gave us George Orwell, Aldous Huxley, and C.S.Lewis. The latter two - writing in years still under the shadow of Nazism - had the prescience to discern that the final assault upon humanity was not to be from the abuse of political power but of our knowledge of pharmacology and genetics (op. cit.,21).

To establish his argument that the 'Brave New World' is practically upon us, Ramsey places a good deal of emphasis on the more dramatic and less-used features of reproductive technology from 'inter-species fertilisation' to 'cloning'.

But how strong are such 'slippery slope' arguments in general? Not very strong seems to be the common answer. Gorovitz takes a refreshingly direct approach in refuting Ramsey. He takes a practical example: 'No skier thinks the argument is generally good; fortunately it is often possible to start down a slippery slope and then to

stop' (Gorovitz,1985:167). When it comes to negotiating slippery slopes, much depends on how slippery the slope is and on the kind of expertise one has. In other words, slippery slope arguments depend for their cogency on empirical arguments. Again, as Gorovitz puts it, 'Some processes, like nuclear chain reactions or the spreading of an epidemic, once begun are difficult or impossible to stop. Others are not.' (ibid.) One has to turn to experience to see if IVF or AID or Surrogacy form the beginning of such a slippery slope. From the moral point of view a slippery slope can exist strictly speaking only if there is no morally relevant difference between the moral positions on the slope.

One further point needs to be made, however, about slippery slope arguments. It is one mentioned by the philosopher Bernard Williams (1985) in his essay 'Which Slopes are Slippery?'. He draws a distinction between a situation where a difference between two moral positions can be reasonably defended logically, but not effectively defended 'as a matter of social or psychological fact' (Williams,1985:127-128). In other words, some of the differences between positions which would lead one to avoid a slippery slope are so subtle, and some of the positions taken up by individuals are so biased or prejudiced, that certain persons are to be found out of control on the slopes. This is important as a qualification of Gorovitz's position, which tends to assume that moral agents are always reasonable, if not from the start, then at least after being given a philosophical tutorial. In fact, it is common knowledge that moral agents are not so easily divided into rational and irrational agents; moral positions are often an amalgam of reason and emotion. This point also fits in well with the Christian intuition of the presence of sin in human emotions and reason. Men and women are often tempted to suppress morally relevant differences.

Applying all of the preceding points to reproductive technology, one can argue that there are morally relevant differences which distinguish various steps along the way from AIH to cloning, and as a result the alleged slopes are not so slippery after all, once one tries to overcome fears about what might happen and to think clearly.

If one takes the moral high-ground of course, as in the case of Congregation for the Doctrine of the Faith, then AIH is the beginning of the slippery slope towards 'technologising' marriage (cf.McCormick,1981: 327). Already one is separating the basic goods of love and procreation, and further steps such as AID and IVF simply repeat the same 'dehumanising' structure. Any further differences are morally relevant, but secondarily so. The original breach has been made, according to this viewpoint, once procreation has been separated from sexual intercourse. (In fact, some might say that contraception itself is the 'real' beginning of the slippery slope, since this was the first technological move in separating the unitive and procreative goods.)

For others, the slippery slope begins with AID rather than AIH, because this involves the involvement of a third party in the intimacy of marriage and the attempt to alienate rights which are strictly inalienable. The fact that sexual intercourse between wife and donor does not take place is beside the point here, since reproductive rights apply to the use of the reproductive faculty exclusively within marriage, not merely the use of sex within marriage. Once AID is accepted, according to this position, one has to accept in principle ovum donation, and perhaps even embryo donation. It may also be possible to accept AIH and AID, but reject all cases of IVF, even the simple case, on the grounds that IVF must involve some experimentation on embryos outside the body of the female, and that much more technology is used in contrast with AI. Then one can expect some people to

accept the simple case of IVF, but reject developments beyond this as I have chronicled them. This position would accept a limited stewardship over creation, drawing strict limits at a certain point. It is even possible to accept IVF with surrogacy and yet reject the creation of embryos for experimentation in areas which have nothing to do with helping childless couples found a family. This position would be motivated wholly by sympathy for the infertile. Given these various possible cut-off positions, it is doubtful whether one can speak of one commonly accepted position which would amount to the beginning of the slippery slope towards disaster. This is because of the great number of different moral positions which enable people to stop at definite, but different, points. Therefore I find it difficult to accept the idea of a right against all developments in the sphere of reproductive technology on the basis of slippery slope arguments.

9.5 The Application of Rights-Language

Since the basic model of rights I have followed has been an Interest or Benefit theory, much of the discussion of reproductive rights has concentrated on the conflicts of interests which arise in this whole area. The primary conflict will always be between the couple who want a baby and the welfare of the child itself (at various stages of the development of its 'potentiality'. But further problems arise when third parties enter the situation. IVF is especially significant in allowing this to happen, when one passes beyond the simple case. Then one can have a mixture of sperm donation, ovum donation, and womb-leasing. Not only does this present possible problems of identity for the child procreated as a result of such arrangements, but these changes in personal origins mean a revolutionary change in the institution of the family. In general, too, IVF means a more radical

move into the trend of introducing technology into the intimate sphere of human procreation, at a time when the family is being hailed by some as a haven of intimacy in a heartless world (the phrase is from Lasch,1977). In these various situations the interests of various people are at stake, so one can say that possibly some rights are at stake.

I shall treat first of all of the alleged right of married, but childless, couples to have children by IVF, confining myself to discussion of moral rights.

First, I can relate this present question to what I said in the last chapter about the rights to use AI. The 'simple case' of IVF is somewhat similar to AIH insofar as no third party is involved as a donor. If one's moral objections to the right to use IVF are based on third party interference, then the simple case of IVF might be seen as at least a liberty-right and a power-right. However, the matter is complicated even in the simple case of IVF by the trebly-experimental character of the procedure. Firstly, any success it has achieved has been 'at the expense' of embryos sacrificed in experimentations to improve the method. Secondly, there are signs that IVF embryos may spontaneously abort more often than embryos conceived in vivo. And, thirdly, there is some doubt about the future health and welfare of IVF children.

Because of these features a couple may feel that they have no liberty-right and no power-right to conceive by IVF. The reasons may be either the conflict of rights between the couple and any embryos they might produce by this process, or a conflict of interests between generations if one is considering 'future persons'. (Before a couple decide to use IVF, the embryos and children they might produce are such future persons; since they do not exist yet, they have no rights, but a

couple should consider their future interests.). If the couple hold that embryos have strict rights either as 'actual human beings' or as 'potential persons', they may then hold that their own right to found a family (which is a qualified claim-right) is overridden by the claim-right of the embryo-fetus to the best chance of development within the womb. Although the future embryo has no right not to be conceived, those who might conceive it have perhaps some duties concerning it, but not to it. This means that a couple may have a duty not to conceive a child by IVF without the child having a correlative right. The couple must consider the claim-rights of the embryo once it comes into existence, and if they believe in advance that it will be disadvantaged in some way, they should avoid getting into the situation where its rights will be violated.

If it is held that the risks to embryos and future persons are exaggerated, and that they are in any case justified in terms of human stewardship, then the simple case of IVF may become a liberty-right and the key to a power-right for the couple. (I say 'the key' here, because a power-right refers to the capacity to change a relationship without direct reference to the means. However, a bad means can affect the power, while a good means is 'a key which unlocks the power', so to speak.) Any rights of embryos and the interests of future persons are then overridden. However, while claim-rights imply liberty-rights, the opposite is not the case, and partners in marriage do not have claim-rights against each other to use IVF, even if they regard procreation in general as a mandatory right. This is because of the immense strain on the couple entailed by the procedure as mentioned by Winston above (including the invasive nature of the techniques). Thus, if IVF is acceptable morally, it is probably in the category of supererogatory actions. All such actions are liberties, and no one else has the claim-right against one to perform an heroic act (cf.

Urmson,1958). I think the same point can be applied to both AIH and AID.

All of this assumes, of course, that one does not take the strict Roman Catholic view that there is simply no right to artificial fertilisation in any guise because it separates basic goods. In holding such a view, a couple would have no liberty, claim or power to found a family even under the simple case of IVF

As to the question of claims against the state to provide at least the simple case of IVF for infertile couples, this is more controversial than provision of AI. This is because of the extra expense in terms of resources required to develop IVF. Regarding AIH and AID, the technology involved is relatively simple compared with IVF, and there is even mention of 'do-it-yourself-kits' for those who wish AI (cf.Klein,1984). The question of resources spent on IVF should not be confused with resources spent on infertility treatment in general. In fact, there is the danger that the value of IVF is exaggerated (often due to media attention), and that this tends to divert resources from other forms of infertility treatment. It seems reasonable indeed to seek ways of helping the infertile in ways that are least controversial morally and legally.

As well as the problem of claim-rights against the state, there are the parallel problems mentioned earlier in relation to AID. Again, couples do not have any claim-right to ova or embryos, especially since such donations demand invasive techniques, as opposed to male masturbation in the case of AID. Moreover, there is a further difference between donating gametes and donating embryos. Whether the latter in particular is a form of 'property' which one can give away, even from the best motives, is highly controversial.

Turning now to IVF beyond the simple case, it would seem that the question of the rights of embryos and the interests of future persons becomes even more problematic. For now one must face the issue of spare embryos which are not returned to the woman's body and are either experimented upon or frozen for later use. If one views embryos as having a claim-right in first place to the best possible development of their potentialities, then obviously experimentation on embryos must be a violation of their rights. (I tend to hold that the interests or rights of embryos as existing human life takes precedence over the interest of future persons to be protected from handicap by such experimentation.) If embryos are frozen with a view to later replacement, then there are the further problems of risk associated with this process. These may be risks of handicap, as well as risks regarding the relationship to one's family (considering that one was conceived perhaps years before one's birth). Once one holds that embryos have basic claim-rights to life, then the desires of couples (and their prima facie rights) to have children must be overridden under these conditions.

One of the further problems associated with the developments of IVF beyond the 'simple case' concerns the whole issue of parent-child relationships. These change radically with the introduction of ovum donation, sperm donation and surrogacy. Quite apart from the experimentation which IVF involves on the biological/physiological level, there is in this case a social revolution in the concept of the family. The rights involved here depend on how important the traditional link between genetic and social relationships in the family. On one hand is the position mentioned by Warnock,1985b:150, 'provided children are brought up by a grown-up who wants them and shows affection, it does not really matter within what kind of group they live: cosiness is all.' On the other hand, there is the

criticism of the Warnock Report by Mahoney,1984a:291, when he says that 'What is being countenanced, and will therefore increase, is a certain element of biological rootlessness in the human race.' Again, one has to pit the desire to have children, which I believe is a right in certain circumstances, against the interests of future persons and the rights of the present generation not to have a hallowed institution - the family - altered radically without serious consideration of the effects.

In my discussion of the application of the Hohfeldian terms in relation to population control (chapter 6), I said that when moral positions are highly controversial, the usual conflict of rights is a conflict of liberty-rights, since these permit the maximum degree of freedom for moral agents while respecting the consciences of others. For instance, where a moral position derives its justifying reasons on the natural law level from some prediction of future events, e.g. world famine as a result of overpopulation, and where such predictions are uncertain, the parties in disagreement have a liberty-right to hold their own positions and to attempt to win others over to it. Neither party has the claim-right against the other to abandon his or her position.

Something similar can be said, I think, in this matter of IVF, except that the more controversial the issues become. e.g. moving from the simple case on to the more 'Brave New World' positions, the less one should talk in terms of conflicts of liberty-rights and the more one should consider the claims and interests of both embryos and wider society. In the simple case of IVF it appears that a number of safeguards have been introduced to make the procedure 'relatively' uncontroversial, and thus the liberty-rights of couples should be taken seriously. Beyond this level it is more difficult to argue for an absence of duty on the part of others with respect to the embryo and the common good. Though one has no duty to

remove all one regards as wrong in the world, one has some duty to attempt to remove the more serious wrongs, insofar as that is within one's compass. Arguably, some such duty and correlative rights are involved when one goes beyond the simple case of IVF. For those who still object to IVF, even at this level, there must be a recognition of a 'right to do wrong', since the wrong in these cases has already been minimised as much as is possible in a pluralistic society.

Finally, it can be argued that couples have an immunity-right against others not to be pressurised into founding a family by using IVF. No one has the power-right or ethical capacity to push a couple into having children by this means. (This includes the right not to be pressurised into donating ova or embryos, or entering into a surrogacy arrangement cf.Singer & Wells,1984:77-78) One could also call this right a claim-right on the part of the couple, but it is valuable to maintain the use of the language of powers and immunities because of the fact that reproductive rights are essentially special moral rights involving the maintenance of or change in the relationship of the couple. (I think it may be advantageous to use immunity-rights with regard to the maintenance of relationships and to keep the language of power-rights for decisions and actions which seek to change relationships.)

9.6 Christian Insights into IVF and its Developments.

Much of what I said about Artificial Insemination from the Christian perspective could be repeated usefully here. I argued that there was a good deal of agreement regarding the permissibility of AIH, but as one moves towards AID, sperm banks, and eugenic approaches to procreation, one meets with more disagreement, both within and between the churches of the Christian tra-

dition. With regard to IVF, then, one can expect more approval for the simple case of IVF and more controversy in relation to the further developments - ovum donation, embryo donation and surrogacy. And this is exactly the case: within the Roman Catholic church there is a strict, negative approach which cuts off all possibilities of accepting IVF, since even AIH is rejected as a wrong means to the end of procreation. But even within that church there are dissenting voices, usually the same ones as were advocating the acceptance of AIH and questioning the moral status of embryos from the moment of conception.

A Application of Some Earlier Points

Some points made in earlier chapters relating to the Christian contribution to the judgement on reproductive freedom can be applied again here. For instance, in chapter 7 reference was made to the Christian consciousness of sin in the world, found hidden even in good intentions. For all the talk, then, of compassion for the infertile, especially on the part of the scientific community, one must sound the warning regarding the ubiquity of sin in human life. This can be found to some extent, perhaps, in the ambitions of researchers to make a name for themselves, such that the reasons given for pursuing their projects at the expense of respect for the rights and interests of the weakest members of the moral community, are mere rationalisations covering these less worthy motives.

One should recall as well a related point to the one just made, namely, Ramsey's warning concerning obsession with certain ends which are good in themselves. Once one gets into the frame of mind that one must 'ensure' that a good end be achieved, then there is the likelihood that questionable means will be pressed into service. But wrong means can achieve good ends, if at all, only at the

expense of sacrificing other goods and rights. Thus, it is sometimes better to leave a good end unachieved rather than do evil to achieve it.

Having said that Christians ought to show concern that the means used to achieve a good end be morally apt, one has to remember that the work of discerning such a relationship often involves risks. Still, the Christian moral tradition has taken up this challenge in many situations. The doctrine of double effect is one such attempt to avoid moral paralysis, by working out a proportion between good and bad effects and insisting that the bad effect remain praeter intentionem (cf.Mangan,1949). The doctrine of the 'just war' and the more general permission to defend oneself, even against innocent aggressors, are further examples of Christianity's adopting 'risky' means to achieve good ends (cf. Ford,1944, on 'The Morality of Obliteration Bombing'). Given such examples, one wonders if some present positions, especially within the Roman Catholic tradition, are not too rigorous. This is one of the dangers of a deontological approach when it divorces itself from value-balancing and the experience of suffering of individuals and groups.

B The Interaction Between Principles and Situations

Another way of expressing this argument is by reference to the relationship between principles and situations. As J. Mahoney (1985) has said:

> [The] particular weakness of applying general moral principles selectively to typical situations leads into the main weakness of viewing moral reasoning as simply applying principles: that it is conceived as a logical one-way movement from principle to situation. It allows no possibility for the situation itself to influence the principle, and,in fact, does not give sufficient consideration to the origin of moral principles themselves (Mahoney, 1985:293).

The argument that AIH is morally wrong because of the principle that prohibits masturbation may well be an example of this gap that has opened up between principles and situations. And who knows what other new situations in the realm of reproductive technology might ultimately, if taken seriously, lead to an adaptation of traditional principles? Arguably, Christian couples, and especially the infertile, have a right to the best moral reasoning the Church can provide. This, I think, is a prior right of Christians,i.e. prior to their decision regarding the use of their generative faculties.

There is in fact the danger of using the language of rights in such a way as to violate rights. Most obviously this can occur when certain actions and practices are made the object of mandatory, inalienable and absolute rights, when they ought to be the object of discretionary rights. Such an approach is a translation of the position which traditionally prefers the language of duty and absolute principle applied stringently to each and every case. But the advocates of this way of thinking may conceal their absolutist tendencies under the guise of the language of rights with its stress on freedom. However, the only freedom is that of doing one's duty, and the symptom of this style of thought is the rigid limitation of discretionary rights. It would be interesting to go back over the arguments against AI and IVF in order to discern the balance between mandatory and discretionary rights in Christian moral doctrine on these topics.

C Highlighting General Principles and Values

In the earlier discussion (4.3,A&B) of specifically Christian reasons for acting morally, I mentioned general and particular reasons. At the general level, for instance, Christians act morally out of gratitude to God for creation and redemption. Christians are supposed to

take Jesus Christ as their model in life, imitating his spirit of love but not slavishly imitating his culturally relative life-style. There should be a spirit of detachment too, since the follower of Christ is living in the 'last times', and there must be an eschatological aspect to one's life.

At the particular level, the Christian can and must borrow insights from divine revelation and through theology (faith seeking understanding) try to develop specifically Christian principles regarding how to participate in certain basic goods. Thus, for instance, the concept of marriage as reflecting the relationship between Christ and his Church in Ephesians 5 should provide the believer with a deeper reason for respecting the basic human right to marry. Having children gains a deeper justifying reason from the doctrine of Christian hope and the idea that God calls persons to particular states of life.

However, given all of this religious background to procreation and the founding of a family, one must take into account the great difficulty of making further judgements on the specific ways in which procreation may be achieved, the manner in which procreation and fertility may be controlled, the risks that may be taken in relation to the welfare of future persons, the relationship between the needs of individuals, couples and society at large regarding procreation, and so on. In other words, the right to follow out some particular vocation is largely dependent on moral discernment involving natural law reasons in principle open to all rational creatures.

I prefer to think that the Christian Church's special contribution to the debate on IVF as an answer to infertility must remain on the general level of underlining the important values at stake. In the

language of rights, this means that the Church must uphold the right of all childless persons, including its own members who share this burden, to have their needs taken seriously, rather than passing over their pain in a callous way. (I feel that Hauerwas (1986) is more than a bit insensitive to the plight of the childless in his negative judgement on IVF. He moves to the conclusion that adoption is the best answer to the problems of childlessness rather quickly and without much argument,op.cit.,149.) More specifically this entails, I believe, a willingness to embark upon an ongoing study of the various aspects of treatment of infertility, with a view to giving moral guidance to all persons of good will. Such moral guidance should avoid being dogmatic in the more controversial areas, where Christians are not agreed on the moral principles involved and where the effects or consequences of certain developments are still unknown. Some room must be allowed for reasonable dissent from 'official church' positions, taking into account not just the strong feelings and needs of the childless, but also the validity of the reasons for conflicting positions.

9.7 Conclusion

It is difficult to summarise this long chapter in a few lines. All I want to do is to underline some of the distinctive points made in these pages.

This chapter has been a continuation of the discussion begun in the last chapter on Artificial Insemination. It takes up again the putative rights of the infertile, rights that have to be taken seriously because of the important good involved. I have not questioned the good of the end in question (except to reject attempts to absolutise it), nor the judgement that infertile couples have a *prima facie* right to found a family. What I have

questioned are the means appropriate to achieve that end. If IVF is a wrong means to a good end, then there is an argument that other important rights and interests are being sacrificed for the good and right of procreation. So this chapter has once again concentrated on conflicts of putative rights.

Again, for those who take the moral high ground regarding the necessary connection between procreation and sexual love, all forms of IVF are illicit from the moral point of view, just as AIH and AID are illicit. But what makes this chapter different from the previous one is the introduction of the notion of rights possessed by embryos (or pre-embryos).

In earlier chapters the rights under discussion were always the rights of individuals that were clearly personal, even though some of the retarded lack some of the distinctive endowment usually associated with full personhood. It will be recalled how I rejected the view that future persons have rights. Here in this chapter the question has been, 'Are embryos sufficiently like persons to merit saying that they have the rights (or some of the rights) of persons?

This discussion took me into the realms of metaphysics, for instance regarding the notion of ensoulment, and the question of when human life merits the protection of the language of rights. I argued tentatively for the maintenance of the language of 'potential persons', especially for the embryo before clear signs of individuation, and I refused to accept a priori the view that embryos' rights (as potential persons) always give way to those of actual people.

In general I was more favourably disposed to claims of rights in the so-called 'simple case' of IVF, than to claims for the further developments. It seems to me that

the rights of embryos and of wider society grow stronger as against the rights of the childless when one begins to consider ovum donation, surrogacy, and deliberate experimentation on embryos with no intention of allowing their potential to develop. I showed that distinctions can be made between the various developments in reproductive technology and that there was therefore no need to argue for a right against all versions of artificial fertilisation because of fears of a 'brave new world' scenario.

Again I applied the Hohfeldian distinctions to show the normative relationships associated with the conflicting possibilities of participating in reproductive goods. I stressed the claim-rights of embryos in certain cases and the liberty-rights and power-rights of couples in other cases. The core right is still a power-right in relation to the infertile couple's ethical capacity to become parents, but I said that the inappropriateness of certain means can prevent the exercise of the power. Only if there is a liberty or a claim to use some means can the power-right be activated.

Finally, I repeated my arguments concerning the limitations of the Christian moral tradition in presenting specific justifying reasons for judging certain means inappropriate for the good end of founding a family. Christian reasons work at a deeper level, but they remain important in pointing out the vital need not to block the possibilities of procreation without serious thought, and in particular without allowing situations speak to the traditional moral principles in a challenging manner.

Conclusion

The best way I can think of to conclude this work is by relating it to traditional moral theology, especially in the Roman Catholic 'manual' approach. (For a short history of this approach from the 'Institutiones morales' of the 17th century to the modern 'manuals' of Tillman and Haring, see Peschke,1975:53ff.) In that light, the novelty of my approach will be seen as well as the aspects of continuity with the tradition.

As is well known, the manuals were an attempt to provide clergy with guidance in directing their flock, especially in the confessional, hence their reputation for casuistry. However, when one looks at some standard manuals for a reference to method in moral theology, one finds that, in theory at least, their authors were interested in wider aspects of theology.

Take, for instance, A Handbook of Moral Theology (1918), by Antony Koch (adapted and edited by Arthur Preuss). In the first volume of this work there is a chapter on 'The Methods of Moral Theology' (ch VIII) with mention of three main methods: the 'Scholastic' or 'Speculative' method; the 'Practical' or 'Casuistic' method; and the 'Ascetic' method. Koch states that, 'The Church has prescribed none of the three methods enumerated above for the study and teaching of Moral Theology. As each method covers but a portion of the vast field traversed by this science, all three should be employed together.' (Koch-Preuss,1918:39). Reference to these same methods are found in other standard manuals, cf. Prummer,1956:1; and with some variation, Noldin,1935:6.

The Scholastic or Speculative method is described by Koch-Preuss as deriving its data from positive theology, 'that is to say, it examines the teaching of Scripture

and Tradition and expounds the moral principles derived from that teaching in the light of reason' (op.cit.,36). He goes on to state that the purpose of this method is to 'set forth the eternal ideas of right and wrong as they exist in the divine intellect, the ethical faculties of man, and divine Revelation.' (ibid.,37).

The Practical or Casuistic method is defined as the 'technical instruction in the application of the general principles of morality to special conditions and events' (ibid.). The Ascetic method, according to this author, 'shows how the means of grace should be employed so as to enable man to attain perfection.' (ibid.,38)

In practice, the manual approach to moral theology concentrated on the enunciation of principles and the application of these principles to particular situations. Although the Scholastic-Speculative method would lead one to expect a relatively deep analysis of the ways of God in Scripture and Tradition, this is not apparent in most of the manuals, where the interest is in the discovery of proof texts which will back up principles. The bulk of the manuals was then devoted to the Casuistic method, applying the principles to cases. The Ascetic method was not really stressed, except insofar as the manuals went on to deal with the sacraments and pastoral theology. In fact, some writers held that there should be a strict separation between moral theology and ascetical theology. Thus, Henry Davis (1935:4) insists that 'it is precisely about law that Moral Theology is concerned. It is not a mirror of perfection, showing man the way of perfection.' And Garth Hallett comments on the separation of spiritual and ascetical theology from the other branches in his discussion of the distinction between precepts and counsels (Hallett,1983:75). Even though the manuals treat of the virtues in detail, the treatment is generally legalistic. The hopes raised by this threefold methodology tend to remain unfulfilled, and this is a pity

considering the promise contained therein.

What then of my treatment of the language of rights - how does it relate to the traditional methodology above? Firstly, regarding the Scholastic/Speculative method, there was some employment of this in the chapter on normative moral scepticism concerning rights (ch 3) and in the chapter on theological foundations (ch 4). In the discussion of deeper justifying reasons for acting morally, reference was made to the concept of gratitude to God for creation and redemption. The fact that Christians see morality as directed towards God and his eschatological Kingdom was underlined; and the way in which Christ acts as a model or exemplar of humanity was not ignored, especially with regard to the meaning his life, death and resurrection give to human suffering.

At a more particular level, I discussed the appropriateness of referring the language of rights to God, indicating the difficulties here in line with traditional theism's view of God's attributes, especially his impassability. I felt that the best approach was to view rights as gifts of God to humanity as a protection against the effects of sin and destructive conflict. (This implies that the right to found a family is neither God's right against humanity, nor a right of humanity against God.) They are necessary to maintain the sense of relative dignity, which then acts as a springboard to the understanding of man's absolute dignity - the valuation which God himself puts on his human creation. Regarding reproductive rights themselves, I placed these in the context of marriage seen as a reflection of Christ's love for his Church, and, furthermore, procreation itself was linked to trinitarian doctrine. A brief mention was made of the value of procreation as a 'revelation-faith experience' in which couples gain some grasp of the gracious Mystery in which they live because of their giving birth to new life.

But all of these points were made without any great depth of discussion, and much more could have been said from the point of view of this method. I could not dwell on the speculative side of rights-language, because the main aim of the thesis has been to provide a metaethical foundation which would underpin the Casuistic method. Note that while the second part of the thesis dealt in some detail with normative questions on the level of principles and situations, the importance of those pages lay in presenting examples of how the distinctions and clarifications made in the first part of the work might apply when relating principles to situations and situations to principles.

(It is interesting to note how the relevance of casuistry has been recognised anew in modern Christian ethics. For instance, Joseph Fletcher (1966) writes in his famous work Situation Ethics: The New Morality that 'Casuistry is the homage paid by legalism to the love of persons, and to realism about life's relativities.'(ibid.,19). His argument is that when casuistry is at the service of love it is good, and that it is in fact indispensable as an application of love as a criterion in judging situations. More recently, Stanley Hauerwas (1984) has praised casuistry in no uncertain terms;

> [N]o community can or should try to avoid developing a tradition of moral testing embodying the wisdom of that community concerning sets of issues peculiar to its nature. The question is not whether to have or not to have casuistry, but what kind we should have (Hauerwas,1984:130-131).

One should note further that Hauerwas's advocacy of casuistry involves, not an individual consulting a text-book, but an attempt to remain faithful to the narrative structure of his or her community. A Christian cannot cut himself or herself off from the story of the community and its ethical implications.)

Since casuists often choose to discuss less typical cases of moral deliberation where dilemmas and quandaries abound, I have followed this example in studying the putative rights of sections of humanity whose interests have been, and are still, often either ignored or given low priority - the poor families of the Third World and the 'poor ghettoes' of the West; the mentally retarded; the infertile and childless; and, some might say, the weakest and most vulnerable of all - embryos and fetuses. My interest has not been in solving conflicts, but in attempting to show the issues involved (especially goods and relationships) and to clarify these by means of certain technical distinctions. My own use of these distinctions has been relatively personal, and it is open to others to make alternative distinctions and to relate them differently to cases. Ultimately, however, the application of the distinctions depends on prior positions in normative ethics. This is seen, for instance, in my policy of seeing reproductive rights as tied to the special moral rights created by marriage, such that reproductive rights are not primarily described as human rights, though they are associated with the human right to marry and are secondarily associated with the general human right to maintain one's health. It is because of this policy to stress special moral rights that the language of power-rights and immunity-rights takes on such importance, even though Hohfeld saw these as secondary to claim-rights and liberty-rights.

When dealing with the language of rights the Casuistic method has to take into account not just the goods in conflict and the need to harmonise one's choice of goods, but also the various normative relationships existing between people. All rights involve normative relationships whereby the good of a person calls out to be fulfilled and which consequently requires some limit on the freedom of another. The question of the stringency of various relationships is a substantive moral one, and not

an easy one to answer. In particular, when one discusses the category of human rights this problem arises, because of the tension between this concept which attempts to build bridges between strangers and the so-called 'ethics of strangers' which has become prevalent today. Although I am somewhat biased in the matter, I feel that the Franciscan tradition with its emphasis on human fraternity under God offers a fitting context or base for the work of revealing the wider normative relationships which bind God's creatures in one family.

Turning finally to the Ascetical method of moral theology or Christian ethics, I must admit that this has rarely appeared in this thesis, though that is not to deny its importance in the context of a full treatment of the language of rights in the Christian moral tradition. One must not understand 'asceticism' here as referring to the distinction between precept and counsel alone or to heroic efforts to attain Christian perfection, though these aspects are a part of ascetical theology. More important is the study of the ways and means which Christians use to respect and promote the rights of humanity.

Included in this method is the proper understanding of suffering in human life, including the mysterious problem of evil. This implies, as I argued in chapter 3, a critique of obsessive attempts to avoid suffering by invoking the language of rights immoderately. There is a sense, even, in which Christians have a right to 'share in the fellowship of Christ's sufferings' for the salvation of the world. This method also implies, I think, a liturgical and prayer-centred context for the Christian struggle to promote rights. Concern with justice should enter into liturgical celebrations as Christians pray for the promotion of rights and the discernment to see the rights that are truly important. I have argued in chapter 4 that prayer and sacraments must

not be unduly 'spiritualised', but must be related to human efforts to flourish in God's world.

In my opinion, the Ascetical method underlines concern for the vital moral and religious categories of virtue and character. Again in this thesis I have not dwelt much on these topics. This is because I feel that the more basic category in moral reasoning concerns the basic goods which are the objects of obligations, rights, and virtue. Of course virtue is essential, for without an habitual will to maintain normative relationships directed at human participation in basic goods, rights will not be respected. Moreover, a Christian discussion of the complex relationships between justice and love would be of immense value in understanding the concerns of the other methods mentioned above. An example which comes to mind at once is the role sacrificial love might play in the waiving of rights in conflict situations. This would also reflect the limitations imposed by God's love on his gift of rights to human beings. Christians need to reflect on the need to discern occasions when his gifts (such as rights) are not to be used when the interests of others need to be promoted instead. (Cf. Denis Carroll,1987:158-160, for a brief discussion of 'The Ascesis of Human Rights'.)

It seems that this conclusion has spoken more of what is missing from my thesis with regard to a Christian ethical approach to rights and rights-language than to what I have managed to treat. But this is a necessary admission in view of my quite limited intentions. Much of my work has been a philosophical preparation for the use of rights-language in theology. The amount of time spent on refuting scepticism reveals what I regard as a justified preoccupation with providing respectable grounds for the use of rights-language. This is not to say that theology has nothing to offer in return for the analysis of rights provided by moral and legal

philosophy. However, the theological contribution seems most valuable in presenting deeper reasons for respecting rights in general and in particular, rather than in solving conflicts between rights at the level of casuistry.

That the Christian Church should have a privileged insight into the solution of moral conflicts between rights must be seen as a rather odd position to hold in the light of the whole second part of this thesis. Just look at the complicated set of issues that has to be explored in attempting to discern how best to respect reproductive freedom, while respecting other important interests. There are questions of prediction, both long-term and short-term; e.g. how will population trends develop over the next twenty or thirty or a hundred years and how will the economy of the world cope?; will a retarded person develop the level of competence which will enable him or her to marry and/or raise a family?; what are the possible consequences in the future arising from the present use of AID and some developments of IVF such as surrogacy? There are metaphysical questions regarding the beginning of human life and concerning which Christianity itself has developed a relatively humble stance, e.g. in relation to the 'time of ensoulment'. There are questions of ultimate principles in morality, for instance in relation to the 'essence' of a vocation such as marriage and parenthood. What freedom does the marriage covenant or contract allow the Christian couple in deciding on whether to found a family, the size of the family, and the means used to either limit family size or to overcome infertility? And there are also questions related to the different categories of persons whose 'interests' are affected by the claim to be allowed to reproduce; there may be a conflict of interests not only between existing generations - parents and their children - but also between existing generations and future generations. This

question has a certain overlap with the problem mentioned above regarding the beginning of human life. I pointed out that one way of discussing that problem involves talk of 'potential persons'. Thus, in discussing the language of rights in the context of reproductive freedom, one has to discern in what senses such language applies to these categories.

This thesis has not been concerned with providing definitive solutions to such problems. I have been interested in revealing the complexity of the goods and relationships involved in moral deliberation regarding what seems to be an obvious right - the right to found a family. I hope that the exploration of the issues and the concentration on the various distinctions making up the language of rights will be of help to theologians as they try to discern God's will concerning the use of one of his greatest gifts - procreation.

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